

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1897.

No. 22. /22.

C. P. DEWEY, PLAINTIFF IN ERROR,

vs.

THE CITY OF DES MOINES, G. H. DILWORTH, TREASURER OF POLK COUNTY, AND THE DES MOINES BRICK MANUFACTURING COMPANY.

IS ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

FILED JUNE 11, 1897.

(16,608.)

60

212

20

172

6415

(16,608.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 395.

C. P. DEWEY, PLAINTIFF IN ERROR,

vs.

THE CITY OF DES MOINES, C. H. DILWORTH, TREASURER OF POLK COUNTY, AND THE DES MOINES BRICK MANUFACTURING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

INDEX.

	Original	Print.
Caption.....	6	1
Appellant's abstract of record.....	1	1
Petition.....	2	1
Amendment to petition.....	6	5
Exhibit A—An ordinance describing the boundaries and wards of the city of Des Moines	17	15
B—Agreement between The City of Des Moines and J. B. Smith & Co., March 15, 1892.....	18	16
Second amendment to petition.....	20	17
Demurrer of City of Des Moines and Dilworth.....	21	18
Answer and counter-claim of Des Moines Brick Mfg. Co.	21	18
Exhibit A—Assessment certificate	26	23
Reply to counter-claim	28	24
Motion to strike from reply	30	26
Stipulation as to pleadings.....	33	29

INDEX.

	Original.	Print.
Final decree	34	30
Assignment of errors	37	32
Notice of oral argument	39	33
Opinion	41	34
Judgment	60	41
Writ of error	61	42
Bond	63	43
Citation	64	44
Proof of service of citation	65	44
Clerk's certificate	66	44
Assignment of errors	67	45

a Pleas before the supreme court of Iowa in a cause entitled C. P. Dewey, appellant, against City of Des Moines, C. H. Dilworth, treasurer of Polk county, and Des Moines Brick Manufacturing Company, appellees.

Be it remembered that on the 3rd day of December, 1895, there was filed in the office of the clerk of the supreme court of Iowa a printed abstract of record, the same being in the words and figures following, to wit:

1 In the Supreme Court of Iowa, January Term, 1896.

C. P. DEWEY, Plaintiff and Appellant,
 vs.
 CITY OF DES MOINES, C. H. DILWORTH, Treasurer of Polk County, and Des Moines Brick Manufacturing Company, Defendants and Appellees. Appeal from Polk County District Court. In Equity.

Hon. C. P. Holmes, judge.

Gatch, Connor & Weaver, attorneys for appellant.
 J. K. Macomber, attorney for City of Des Moines and C. H. Dilworth, appellees.

Guerusey & Baily, attorneys for Des Moines Brick Manufacturing Company, appellee.

Appellant's Abstract of the Record.

2 On April 30, 1894, the plaintiff filed his
 Petition

against the City of Des Moines, and C. H. Dilworth, county treasurer, which petition as amended, was as follows:

Comes now the plaintiff, C. P. Dewey, and for cause of action against the defendants, City of Des Moines and C. H. Dilworth, treasurer, states:

Paragraph 1. That plaintiff is now and for more than five years last past has been a citizen of the State of Illinois and a resident of the city of Chicago, in said State. That in the year 1888 plaintiff became, and ever since has continued to be, the owner of sixty lots in Central Park, said lots being numbered consecutively from seventeen (17) to seventy-six (76) inclusive. That Central Park was surveyed and platted into lots, and said plat filed in the office of the county auditor of Polk county, in the year 1886. That when Central Park was platted into lots, said land and lots were situated outside of the then corporate limits of the city of Des Moines; but that by the provisions of chapter 1, Acts 23 G. A. of Iowa (1890), it was claimed that Central Park and other territory in the neighborhood, extending two and one-half miles eastward from Twenty-

second street (which street extended north and south along the eastern boundary of said city as then constituted), were annexed to and became part of the city of Des Moines; but plaintiff alleges that such alleged annexation was illegal and void for the reasons hereinafter set out, and that plaintiff's lots were not legally annexed to said city.

Par. 2. That the city of Des Moines is a municipal corporation organized under the general incorporation law of the State of Iowa; and the other defendant, C. H. Dilworth, is the duly elected and acting county treasurer of Polk county, Iowa.

Par. 3. That on or about May 11th, 1891, the city council of the city of Des Moines adopted the following resolution: "That it is hereby declared necessary that East Grand avenue from Eighteenth street to the State fair grounds be improved by paving and curbing." And on the same day the city council adopted the following further resolution: "That the board of public works be instructed to advertise for bids for curbing and paving East Grand avenue from Eighteenth street to the State fair grounds, the same to be curbed with artificial stone and paved with brick." That thereafter and

on April 15th, 1892, the following proceedings were had by
3 the city council of said city: "The board of public works presented a contract of J. B. Smith & Co. for paving East Grand avenue from Eighteenth street to the State fair grounds, and by motion approved." That thereafter and between April, 1892, and June, 1893, a brick pavement was laid down upon East Grand avenue between the points designated in the foregoing resolutions of the city council, said paving being upon the street opposite the lots hereinbefore described, owned by plaintiff, each and all of said lots abutting upon said East Grand avenue, and each of said lots having a frontage of forty feet and an average depth from the street line of one hundred thirty-seven and one-half feet (thirty of said lots having a depth of one hundred and forty-five feet each and thirty having a depth of one hundred and thirty feet each). That against each of the lots owned by plaintiff, and hereinbefore described, there was assessed as the proportional share of such lot, and against the plaintiff as the owner thereof, the sum of \$148.80 for the cost of the paving of said street, and against the entire sixty lots owned by plaintiff the aggregate sum of \$8,928 was assessed, such apportionment and assessment being made on or about May 19, 1893, and approved by the council on June 12, 1893, which tax plaintiff has refused to pay, claiming the same to be illegal and void for the reasons hereinafter set out.

Par. 4. That the said tax of \$8,928 principal has been certified by the city clerk of said city to the county auditor of Polk county, and by the county auditor of said county has been placed upon the books of the county treasurer, said defendant Dilworth, and said Dilworth as treasurer is attempting to enforce and collect the said tax with a penalty or interest of one per cent. a month; and that both defendants claim that the plaintiff is personally liable for the payment of said tax with interest and penalties and will enforce payment thereof unless restrained by the order and decree of this

court. That said alleged tax is a cloud upon the title of the real estate of this plaintiff, and the personal property of this plaintiff is liable to be illegally seized for the payment of said alleged tax, and plaintiff has no remedy as against the enforcement of the same except in obtaining such relief as may be granted by a court of equity.

Par. 5. That plaintiff had no actual notice or knowledge of the resolutions of the city council aforesaid to pave said street until after the completion and acceptance of the work on same, nor did he have any such notice or knowledge of said special tax until he applied to the county treasurer of Polk county for a statement of the general taxes upon his property, in the month of March, 1894. That plaintiff had no actual notice or knowledge that paving certificates had been issued against his property, hereinbefore described, nor had he any notice or knowledge of the right or opportunity to sign the waiver upon such paving certificates, provided for in the statute and ordinance under which said work was done; and plaintiff had no constructive knowledge in respect to any of the matters aforesaid, except such as might be afforded by the publications in newspapers in the city of Des Moines and posting notices along the street in respect thereto. That the amount of said tax is greater than the reasonable market value of said lots, whether considered singly or together; the assessment against each particular lot being greater in amount than the value of such particular lot, and the aggregate assessment being greater in amount than the reasonable market value of all of said lots taken together; and that said defendants are seeking to enforce as against plaintiff not merely a sale of said lots but also to compel plaintiff to pay the full amount of said tax regardless of whatever sum said lots may be sold for and regardless of the actual value of the same.

Par. 6. That the resolutions to pave said street and the order directing said work to be done were oppressive, collusive, fraudulent and void. That in the year 1886 the highway now called East Grand avenue was laid out and opened under the order and directions of the board of supervisors of Polk county, Iowa. That said highway was laid out and opened one hundred feet wide and was at that time in a fair condition for public travel. That said highway between the points designated in the resolution of the city council as Eighteenth street on the west and the fair grounds on the east was worked and improved between 1886 and April, 1890, so that it became a first-class country road and was traversed largely by vehicles passing from the city to the State fair grounds and returning, during the four years last mentioned. That in 1886 the fair grounds of the State Agricultural Society of Iowa were established about one mile east of the eastern limits of the city of Des Moines as then established, and that said highway now known as East Grand avenue was thereafter largely used and traveled in reaching said fair grounds and there was no complaint or objection to such roadway, except that it was somewhat dusty in dry weather.

That in the year 1890, when the attempt was made to extend the

eastern limits of the city of Des Moines two and one-half miles farther to the east, as hereinafter set out, the directors of the State Agricultural Society solicited the city council of Des Moines to cause East Grand avenue to be curbed and paved from Eighteenth street, being near the eastern limit of said city, before such alleged annexation, eastward to the State fair grounds, the reason assigned being the great benefit which would accrue to said State Agricultural Society in holding its annual State fair. That there was no real necessity for paving or curbing said street between Eighteenth 5 street and the State fair grounds, so far as the property or interests of persons residing or owning property along said street were concerned. That the distance between the points just mentioned is something over one mile, but in that entire distance and on both sides of said street there are now only four small and inexpensive houses, and some of them were not built when the street was ordered improved in 1891. That along said street on both sides, between the points just mentioned, there are no stores, shops, factories or buildings of any description whatever, except only the four small dwelling-houses just mentioned; and the owners of said four improved lots were opposed to the paving of the street. That all the property-owners on both sides of said street, between Eighteenth street and the State fair grounds, were opposed to the paving and curbing of said street at the expense of abutting property, and many of said owners protested to the city authorities against such improvement; but that said city council at the solicitation and sole instance, and for the benefit alone of the State Agricultural Society and its directors, and in collusion with said society and directors, when there was no actual necessity or real occasion therefor otherwise, passed said resolutions of necessity and ordered said work to be done, and approved and accepted said work, and levied said tax, and is now seeking to enforce the same against the property of the plaintiff and of others abutting upon said street. That between Eighteenth street on the west and the State fair grounds on the east, along and abutting upon said East Grand avenue, there is a strip of land abutting on the north side of said street, and extending 1,697 feet, and a strip of land abutting on the south side extending the same distance, which tracts have never been laid off into lots of ten acres or less, but form part of a tract of ninety-seven acres which is now and at all times previous since being surveyed by the Government, has been used in good faith alone for agricultural purposes. That the balance of the land between Eighteenth street and the fair grounds, so far as the same abuts upon the street, has been laid off into a fringe of lots on each side of the street, behind which fringe of lots the land is unplatted and is used in good faith for agricultural purposes; but said lots on either side of said street, except the four hereinbefore mentioned, have not been built upon or in any manner occupied, fenced or used, otherwise than they were used before the map or plat was made designating them as lots. And plaintiff alleges that the State Agricultural Society, a private corporation under the laws of Iowa, holds a fair on its grounds lying immediately east of Twenty-eighth street in such alleged extended

limits of said city, on or about the first week of September in each year; that large numbers of people visit such fair each year from all sections of the State, and that East Grand avenue is and has been the most direct and convenient highway to said fair grounds for wagons, horses and cattle and persons having them in charge. That under the circumstances aforesaid, and at the solicitation of the directors of said State Agricultural Society, the said city council, desiring to aid said agricultural society, and well knowing that the paving of said highway was unnecessary except alone for the purpose aforesaid, and well knowing that such paving would be of no benefit to the owners of abutting property and was unnecessary for any city use or purpose, or for the use or purpose of the people living along said street or living in any other portion of the city, and also well knowing that the cost of the paving alone (which was ordered to be laid forty-two feet in width along said street), aside from the cost of curbing and sidewalks, would largely exceed the market value of abutting lots one hundred and fifty feet in depth; knowing all these matters, nevertheless, the said city council, fraudulently and collusively and oppressively, and to the great oppression and wrong of plaintiff and other owners of abutting property along said street, ordered the same to be curbed and paved as aforesaid and caused said work to be done, and assessed the entire cost thereof against the owners of abutting property along said street.

Amendment to Petition.

The plaintiff, by leave of court, amends his petition herein by adding thereto the following allegations, to wit: (Filed May 6, 1894.)

Par. 6a. That the special assessment against plaintiff's said lots, and against each of them, for the contract price of said work, is unauthorized and void because the city of Des Moines did not conform to or comply with the statute in publishing proposals for said paving, or in letting the contract under which said work was done. That the statute in force in said city, regulating the paving of streets and the assessment of the cost against the owners of abutting property, at the time the contract for said work was legally entered into, to wit, April 15, 1892, was chapter 14 of the Acts of the Twenty-third General Assembly, as amended by chapter 12 of the Acts of the Twenty-fourth General Assembly. That by the terms of said amendment, which took effect by publication on the 5th day of April, 1892, the provisions of chapter 14, Acts of the Twenty-third General Assembly, were made applicable to "all cities in this State containing, according to any legally authorized census or enumeration, a population of over 4,000," and thereby included and referred to the city of Des Moines, which then had by the last legal census a population of over 4,000.

7 That section 3 of said chapter 14, Acts of the Twenty-third General Assembly, is as follows:

"All such contracts shall be made by the council or the board of public works, when such board shall exist, in the name of the city, and shall be made with the lowest bidder or bidders upon sealed

proposals, after public notice for not less than ten days in at least two newspapers of said city, which notice shall state as nearly as practicable the extent of the work, the kind of material to be furnished, when the work shall be done, and at what time the proposals shall be acted upon."

That the city of Des Moines at all times in the year 1892 had a legally established and acting board of public works, and that said board of public works caused to be published in two newspapers in said city for a sufficient length of time, beginning on February 8, 1892, and terminating on February 27, 1892, a notice or proposal to bidders in the following form:

"Proposals for Paving."

"Sealed proposals will be received by the board of public works of the city of Des Moines at their office in the city hall until 12 o'clock noon, February 29, 1892, for paving with brick East Grand avenue from Eighteenth street to the west line of the fair grounds, according to the plans and specifications for said work now on file in our office. Each bid must be accompanied by a bond in the penal sum of \$1,000, conditioned that the bidder, in case the work is awarded him, shall enter into a contract with the city. In lieu of a bond a certified check equal to the above amount will be received. The board reserves the right to reject any and all bids.

R. S. FINKBINE,

R. L. CHASE,

Board of Public Works."

That on the date mentioned bids for said work were received and opened, and on March 15, 1892, the board awarded the contract to J. B. Smith & Co. at \$1.60 per square yard, and on the same day a contract was signed by the board of public works on behalf of the city and by said J. B. Smith & Co. That said written contract contained among other things this provision: "It is hereby expressly understood that the above contract shall be approved by the city council before the same shall be binding upon said city." That the clause just referred to was inserted in said contract in compliance with the provisions of section 5 of chapter 1, Acts Twenty-second General Assembly, prescribing the powers and duties of boards of public works, as follows: "All contracts made and entered into by said board shall be subject to the approval of the city council."

8 That the "plans and specifications for said work now on file in our office," referred to in said published notice to bidders, contained no statement or suggestion as to the extent of the work, or as to the time within which the work should be done, or as to the time when the proposals should be acted upon; nor did said specifications provide or prescribe whether the paving should be laid with one or two rows of brick; nor did said specifications contain any statement of or reference to the distance from Eighteenth street to the west line of the fair grounds, nor to the width of the roadway of said street, from curb to curb, to be paved by the

contractor. That no proposal or notice to contractors was published before entering into said contract except only the "Proposals for paving" herein set out. A copy of the contract is hereto annexed, marked Ex. B, and made part of the petition.

That no binding contract in respect to said work existed between the city of Des Moines and said J. B. Smith & Co. prior to April 15, 1892, when said contract was approved by the city council. That at said date the provisions of section 3 of chapter 14, Acts Twenty-third General Assembly, were in force in the city of Des Moines. That at said date no valid contract for paving said street could be entered into without the publication of proposals of the character and form mentioned in said section 3, and that the proposals for paving, published in February, 1892, were insufficient to authorize the letting of the work, in this:

First. The extent of the work was not stated therein; neither the number of square yards, nor the quantity of brick, nor the distance in feet or yards or otherwise from Eighteenth street to the State fair grounds, nor the width of the roadway to be paved. That in fact, the distance was about one mile, and the street was paved forty-two feet wide the entire distance, with two rows of brick placed upon a foundation of sand, the lower row of brick being laid flat on the sand and the upper row on the edge of the brick; and the entire cost of the work was \$56,891.21.

Second. It was not stated in said proposals "when the work shall be done;" but the contract contained on that subject the following provisions: "The said J. B. Smith & Co. hereby agree to commence said work within ten days after the water pipes are laid and complete the same in ninety days thereafter, provided said water pipes are laid by August 15, 1892." And this further provision: "It is expressly understood that * * * the water pipes be put in said street before the work shall be commenced by the said J. B. Smith & Co." The water pipes referred to were being laid to the State fair grounds, for the sole use of the State Agricultural Society in holding its fairs, and not for the use of residents along said street; 9 said water main not being connected with any residence on said street east of Eighteenth street. That in fact said work was not begun until late in the fall of 1892 and was not completed until the latter part of May, 1893.

Third. That said board failed to state in said notice to bidders, "at what time proposals shall be acted upon;" that in fact said proposals were not acted upon until March 15, 1892; and that, under said notice, it was a matter of discretion with said board when the proposals submitted should be accepted or rejected.

And plaintiff alleges that, by reason of the failure of the board of public works to publish the notice to bidders required by statute, the letting of the contract for the work in question was unauthorized and void, there being no opportunity for real competition among bidders, and the assessment for the contract price is not a valid lien against the property of plaintiff.

Par. 6b. Plaintiff further alleges that, under the statutes relating to the paving of streets in force in the city of Des Moines in the

year 1892, prior to the 5th day of April in said year, the published proposals to bidders set out in paragraph 6a were insufficient to authorize the letting of said contract, in the respect of the failure to state therein the amount of work to be done; and that there was no statute in force in said city in the months of February and March, 1892, which would authorize the letting of the contract in question upon the notice to bidders contained in the published proposals hereinbefore set out; and that whichever statute was in force in February and March, 1892, the assessment in question is void.

Par. 6c. Plaintiff further alleges that the work was not done according to the contract and specifications but was defective in the respect that a large proportion of the brick put into said pavement was very soft and imperfectly burned, when the contract and specifications for the work required the bricks to be hard and well burned; and in the further respect that the quantity of sand bedding used was only about one inch in depth in many places when the specifications required four inches. That said pavement was defective and insufficient and not in compliance with the contract and specifications, in many other respects, which plaintiff will establish, in the event that the assessment heretofore made shall be set aside, and the plaintiff is afforded an opportunity, upon a reassessment or otherwise, to prove the defective character of the work. Plaintiff further alleges that information of the inferior character of the work was communicated to the board of public works before said work was accepted; that one of the paving inspectors reported to the board, before its acceptance, the inferior character of the brick

used and the insufficiency of the sand foundation; that said
10 fact was also reported by said inspector to the city engineer of said city; but that the city engineer and the board of public works disregarded the information given by said paving inspector, made no personal examination of said work, made no personal inspection of the brick being used by the contractors, and relied and acted upon the statements of the contractors. That the said contractors falsely and fraudulently represented and pretended to the city engineer and board of public works that the brick being used by them in said work were sound and hard and well dried and burned, as required by the contract and specifications, when in fact said brick were rotten, soft and imperfectly dried and burned, and not such as the contract and specifications called for. That said brick pavement, after one year's use, has become soft, broken and decayed, showing clearly the soft and imperfect quality of the brick used therein. That said contractors falsely and fraudulently represented and pretended to said engineer and board that they were putting in a sand foundation four inches in depth under said pavement, as required by said contract, when in fact the sand foundation would not average two inches in depth and in many points not over one inch in depth; by reason of which said pavement has become uneven, the bricks turning up on the side and becoming broken and disjointed. In consequence of these defects the pavement was not worth one-half the contract price.

And plaintiff alleges that, by reason of the foregoing, the city engi-

neer and the board of public works, in collusion with and by reason of the false and fraudulent representations of the said J. B. Smith & Co., accepted the said work on the part of the city, having information that it was not done in accordance with the contract and specifications; and plaintiff further alleges that the facts herein set forth can be established by him in case the assessment heretofore made shall be set aside and the opportunity afforded, in making a reassessment or otherwise, if a reassessment should be attempted to be made.

Whereof plaintiff prays, in addition to the relief prayed for in his original petition, that the assessment for the contract price may be decreed to be unauthorized and void and may be set aside, and that the paving certificates issued by authority of the city may be cancelled and set aside.

Par. 7. And plaintiff further alleges that the city of Des Moines had no power or authority to cause said East Grand avenue to be paved from Twenty-second street to the State fair grounds and opposite the property of this plaintiff, for the reason that the territory lying eastward of Twenty-second street was never lawfully annexed to, nor did said territory ever lawfully become a portion of the said city of Des Moines, and is now and always has been outside the corporate limits of said city. That an action at law is now pending in this court, being No. 6149, law, entitled, "The State of Iowa, plaintiff, on the relation of A. G. West vs. The City of Des Moines, defendant." That said action is a petition in the nature of an information in *quo warranto*, to test in that manner the legality of the annexation of certain territory hereinafter described, in which territory the lots owned by plaintiff are situated, but said lots not being in 1890 or at any other time a part of any incorporated city or town. That plaintiff has no remedy or standing in court as a relator in an action of *quo warranto*, for the reason that plaintiff has never been a citizen of the State of Iowa. That plaintiff can only have relief against the unlawful attempt to annex the lots owned by him to said city of Des Moines by this his suit in equity. And plaintiff avers that, if it shall be held that he is not entitled in equity to assail the validity of the attempted and alleged annexation of his said lots to the city of Des Moines, then he is entitled to have a sale of his said lots restrained by injunction until said *quo warranto* action shall have been finally determined in this court and in any court to which it may be appealed. That in said *quo warranto* action the defendant has appeared and made defense, and said action is being prosecuted in good faith and with proper diligence.

Par. 8. That said city of Des Moines was originally incorporated under and by the provisions of chapter 185, Acts Sixth General Assembly of Iowa, approved January 28, 1857; the title of said act being, "An act to incorporate the city of Des Moines, in Polk county;" which act is hereby referred to and made part of this petition as fully as if incorporated therein.

That by section 1 of said act it was provided "that all that portion of the State of Iowa, included within the following limits, to

wit: Beginning at the northeast corner of section 2, township 78, range 24, west fifth P. M. Iowa; thence west to the northwest corner of section 5, township and range aforesaid; thence south to the southwest corner of section 8 in said township; thence east to the southeast corner of section 11 in said township; thence north to the place of beginning, be, and the same is hereby declared a city corporate, by the name of Des Moines; and the inhabitants thereof are created a body corporate and politic, by the name and style of Des Moines; and by the name and style aforesaid, shall have perpetual succession, shall have and use a common seal, which they may alter, change and renew at pleasure, and shall have power to sue and be sued, plead and be impleaded, defend and be defended in all courts of law and equity, to purchase, receive and hold property, both real, personal or mixed, and to improve, protect or sell, lease, convey or dispose of the same; and for the better ordering and governing of said city, the exercise of the corporate powers of the same,
12 hereby granted, and the administration of its fiscal, prudential and municipal concerns, with the conduct, government and direction thereof, shall be vested in a mayor and aldermen, consisting of fourteen members, to be denominated the city council; together with such other officers as are hereinafter provided for."

That by the provisions of said act of incorporation the territory comprised within the limits of the city of Des Moines comprised eight square miles, being four miles east and west and two miles north and south, and no more.

That thereafter, upon the adoption of the constitution of 1857, chapter 157, Acts of the Seventh General Assembly, was approved, the same constituting chapter 51 of the Revision of 1860; said statute among other things authorizing cities organized under special charters to become incorporated under the general incorporation law of the State.

That thereafter, in May, 1863, such proceedings were had by the city of Des Moines, its electors and legally constituted authorities, that the said city of Des Moines, on May 11, 1863, organized under the general incorporation laws of the State and abandoned its special charter, which proceedings were ratified and approved by the provisions of chapter 99, Acts Twelfth General Assembly, approved April 6, 1868, said act being entitled, "An act to legalize the acts of certain cities and towns in their attempts to amend and abandon their special charters, and to legalize elections, ordinances enacted, and other proceedings had by said cities and towns." That ever since May 11, 1863, the city of Des Moines has been organized and acting as a city under the general incorporation laws of the State of Iowa; and that the territorial limits of said city continued the same as fixed in and by chapter 185, Acts Sixth General Assembly aforesaid, until the enactment of chapter 1, Acts Twenty-third General Assembly, and the proceedings had thereunder, hereinafter referred to.

That thereafter, to wit: March 13, 1890, an act of the General Assembly was approved entitled, "An act to extend the limits of cities and for other purposes incident thereto," being chapter 1, Acts

Twenty-third General Assembly of Iowa. That section 1 of said act is as follows:

"SECTION 1. That the boundaries of all cities in this State, which had, by the State census of 1885, a population of 30,000 or more, are hereby extended two and one-half miles in each direction from the present boundaries of said cities. Such extension being so made as to leave the boundaries hereby created in a perfected rectangle; that all the territory embraced within said extended boundaries, whether the same is contained in cities, incorporated towns or otherwise, shall be and become a part of the city and subject to its jurisdiction and authority; and that the corporate character of any annexed territory within the extended boundaries herein specified shall cease and determine; provided, that if any one of such outside boundary lines, as extended by this act, shall come within two miles of a county line, such boundary line on such side shall extend only one and one-half miles beyond the present boundary line of such city; provided, further, that nothing herein contained shall affect the rights of existing creditors, or present boundaries or existing conditions of school districts."

That when said chapter 1 was approved and published the city of Des Moines was the only city in the State of Iowa "which had, by the State census of 1885, a population of thirty thousand or more;" and that said act applied alone to the said city of Des Moines and could not apply to any other city in the State, nor could said act apply by its terms to any other city after attaining a population of thirty thousand or more. That by the terms of said chapter 1 the territory of said city of Des Moines was so extended that it was nine miles east and west and six miles north and south, and its boundaries as thereby created formed "a perfected rectangle" as required by the provisions of the act, and the conditions therein referred to were applicable to no other city in the State except the city of Des Moines. That the territory comprised within the limits of said city, as sought to be extended by said chapter 1, comprises fifty-four square miles, and added to the original limits of said city forty-six square miles. That of the forty six square miles of territory attempted to be annexed to the said city of Des Moines, only about one-eighth has ever been platted or subdivided into lots, and that the other seven-eighths are unplatted and used exclusively for agricultural or horticultural purposes or unused for any purpose except as an open common. That when chapter 1, Acts Twenty-third General Assembly, was approved, North Des Moines had become a city of the second class, and all of the territory therein was attempted to be annexed by chapter 1 aforesaid. That within the territory thus attempted to be annexed were also located the incorporated town of Greenwood Park, the incorporated town of Grant Park, the incorporated town of Sevastopol and others; and that by the provisions of said section 1 of said chapter 1, said incorporated city of the second class and all of said incorporated towns were attempted to be annexed to the city of Des Moines, and thereby their corporate powers were made to cease and determine. That the south boundary line of the city of Des Moines, if extended for a distance

of two and one-half miles, as provided in section 1 of said chapter, would have "come within two miles of a county line," to wit: the north county line of Warren county; and it was therefore provided in said section 1 in effect that the south boundary line of the city of Des Moines "shall extend one and one-half miles beyond the present boundary line of said city." That nearly all, if not all, of the incorporated towns sought to be annexed by said chapter 1 were owing corporate debts, and that the provisions of section 2 of said chapter 1 were intended to control and provide for the manner in which the corporate debts of such annexed municipal corporations should be paid; and the closing provisions in said section 2, referring to real estate owned by such annexed corporations, referred to real estate in fact owned by the incorporated towns hereinbefore mentioned which were by said chapter 1 attempted to be annexed to the city of Des Moines.

That under the provisions of sections 4 and 5 of said chapter 1, commissioners were appointed by the governor for the purpose of reorganizing the wards within the limits of said city of Des Moines as extended, and such proceedings were had therein that the provisions of sections 4 and 5 were substantially complied with. That section 6 of said chapter refers to certain litigation at that time pending between Ford, Weston, Franz and others against the town of North Des Moines and others. That said litigation was then pending in the supreme court of the State of Iowa and resulted in the decision and opinion entitled "Ford vs. Town of North Des Moines and others," 80 Iowa, 626; which opinion and decision the plaintiff refers to as if set out verbatim herein, as a portion of the public history connected with the enactment of said chapter 1, Acts Twenty-third General Assembly, and the annexation proceedings connected therewith.

That at the time aforesaid there was no other city in the State, except only the city of Des Moines, which had contiguous or adjacent to it a city of the second class and one or more incorporated towns, all located within two and one-half miles of the original limits of such city; and that at the date of said annexation law there was no other city in the State of Iowa, except only the city of Des Moines, which by extending its limits two and one-half miles would thereby include another city and one or more incorporated towns.

That the commissioners referred to in section 4 of chapter 1 aforesaid, appointed by the governor and having power to divide such enlarged city into wards and perform other duties, were not appointed in any other city except only the city of Des Moines, and there was no other city in which such commissioners could be appointed under the terms of said act.

That the provisions of section 5 of said act, for the termination of the terms of office of all the officers of such city, refer alone to the city of Des Moines, and could have no reference to any other city in the State; and that by force of said act all the officers of the city of Des Moines, in office when the same was approved, were ousted and their official functions came to an

end, but that the act did not affect any other city in the State, or terminate the office of any officer in any other city of the State, and had no effect or operation in any other city.

That under and by virtue of said section 5 of chapter 1, a full set of officers, as provided by the general incorporation laws of the State, was elected in said year in the city of Des Moines, on the first Monday in April, 1890, and also a full city council, and that the provisions of said section 5, fixing the date of the annual election and providing for the election of a city council and of all city officers at such time, has since been in force in said city of Des Moines and has not been in force in any other city of the State, and all other cities of the first class in the State hold their elections on the first Monday in March, as provided by the general statute, and elect a portion of their officers on even-numbered and a part on odd-numbered years.

That thereafter, on July 15, 1890, the city council of the city of Des Moines adopted an ordinance which was duly approved and published, entitled, "An ordinance describing the boundaries and wards of the city of Des Moines," by section 1 of which the boundary and limits of the city of Des Moines are described and set out, and prescribing the limits of the several wards in said city. A copy of said ordinance is hereto annexed, marked Exhibit A, and made part of this petition.

And plaintiff alleges that since the date of said ordinance, to wit, July 15, 1890, and continuously until now, the said city of Des Moines, without any lawful warrant, grant or charter, has exercised powers not conferred by law, and is so doing, over the territory attempted to be annexed to said city by said chapter 1, Acts Twenty-third General Assembly, and over the territory described in said ordinance of July 15, 1890 (Exhibit A hereto), except only the eight square miles originally included within the corporate limits of said city by its act of incorporation hereinbefore set out, being chapter 185, Acts Sixth General Assembly, over which territory last described said city rightfully exercises its jurisdiction. That the powers exercised by said city of Des Moines, and which it continues to exercise, over said annexed territory, consist, among other things, in declaring said annexed territory to be a portion of the several wards of said city, in levying taxes for city purposes upon the real estate situated within such annexed territory, and in levying upon property abutting upon the highways therein special assessments for curbing, paving and sewer purposes, and in exercising generally all the powers conferred upon cities organized under the general incor-

poration law over the territory lying within the forty-six
16 square miles hereinbefore described and claimed to be annexed to said city, the same as within the original limits thereof, consisting of the eight square miles aforesaid.

And plaintiff alleges that the exercise of such corporate powers and functions within the territory thus sought to be annexed is contrary to law in this, that said chapter 1, Acts Twenty-third General Assembly, is unconstitutional and void. That said statute is a local or special law within the prohibition of section 30 of article 3 of the

constitution of this State, and also within the prohibition of section 1 of article 8 of said constitution. That said chapter 1 is in substance an amendment to the special charter of the city of Des Moines or an amendment to its charter alone to the exclusion of other cities similarly situated; or, if not within that prohibition, then said act is a special or local law in a case where a general law could be made applicable, and in which there was upon the statute book a general law providing for annexation of contiguous territory to cities, and for the consolidation of existing cities and towns. That said chapter 1 was also in effect an amendment to the charters of each of the incorporated towns lying within the annexed territory, in that, that their existing charters were extinguished and the charter of the city of Des Moines was made operative within the limits of each of said incorporated towns. That, in effect, by said chapter 1, a new corporation was created, in which the adjoining incorporated towns and other territory adjacent to said old city limits, with the inhabitants thereof and the property therein situated, were made to constitute integral parts of said new corporation thus created; all contrary to the provisions of section 30 of article 3 and of section 1 of article 8 of the constitution.

Plaintiff further alleges that said chapter 1, Acts Twenty-third General Assembly, if the same is to be deemed a law of a general nature, has never had, and cannot have, a uniform operation as required by section 6 of article 1 of the constitution; and that said chapter 1 aforesaid is in form and substance in violation of section 6 of article 1 of the constitution, and is null and void, if said act is to be deemed in any event a law of a general nature.

Wherefore plaintiff prays the court that a temporary injunction may issue herein prohibiting the sale of all or any of plaintiff's said lots by the defendant C. H. Dilworth, as county treasurer, for the payment of said special tax or any portion thereof, and prohibiting the enforcement of said tax or any portion thereof against other property of plaintiff, or as a personal debt of plaintiff; that on final hearing said tax may be decreed to be unauthorized, fraudulent and void, and that said tax may be canceled upon the books of said county treasurer and decreed to be neither a lien on said lots hereinbefore described nor a personal debt against plaintiff; in

17 the event this court declines to adjudicate the question of the validity of the annexation of the territory in which plaintiff's lots were included, then plaintiff prays that the final decision of this cause may await the determination of that question in the *quo warranto* proceedings now pending and in the meantime may enjoin the sale of plaintiff's lots; and plaintiff prays judgment for costs and such other, further and different relief as he may be entitled to in equity.

GATCH, CONNOR & WEAVER,

Attorneys for Plaintiff.

(Duly verified.)

EXHIBIT A.

An ordinance describing the boundaries and wards of the city of Des Moines.

SECTION 1. Be it ordained by the city council of the city of Des Moines, That the boundaries of said city are defined and hereby declared to be as follows: Commencing at the center of section 23, in township 78, north of range 25, west of the 5th P. M.; thence east along the east and west center lines of sections 23 and 24, township and range aforesaid; sections 19, 20, 21, 22, 23, and 24, township 78, range 24; sections 19 and 20, township 78, range 23, to the center of section 20, township 78, range 23; thence north along the north and south center lines of sections 20, 17, 8, and 5, township 78, range 23, to the quarter-section corner on the north line of section 5 aforesaid; thence north on a continuation of said center line last mentioned to the east and west center line of section 21, township 78, range 23; thence west on the east and west center lines of sections 21, 20, and 19 of township 79, range 23, and sections 24, 23, 22, 21, 20, and 19 of township 79, range 24, and section 24 of township 79, range 25, to a point where a continuation of the north and south center line of sections 2, 11, 14, and 23, in township 78, range 25, intersects said east and west center line last mentioned; thence south on a continuation of the north and south center line of sections 2, 11, 14, and 23 last mentioned to the quarter-section corner on the north line of said section 2; thence south on the north and south center line of sections 2, 11, 14, and 23, in township 78, range 25, to the center of said section 23; and the authority and jurisdiction of the city and its officers shall be coextensive therewith in all cases.

SEC. 2. That the territory embraced in said city shall be and is divided into seven (7) wards, of which the boundaries are defined in the report of the commissioners appointed under the provisions of chapter one (1) of the Acts of the Twenty-third General Assembly of Iowa, which report is on file in the office of the clerk of the district court of Polk county, Iowa, and a duplicate thereof is on file in the office of the city clerk of the city of Des Moines.

SEC. 3. That chapter one (1) of the Revised Ordinances of 1889, and all other ordinances and parts of ordinances in conflict with this ordinance, are hereby repealed.

SEC. 4. This ordinance shall take effect and be in force from and after its passage and publication as provided by law.

Passed July 15th, 1890.

EXHIBIT B.

Contract.

This article of agreement, made and entered into by and between the City of Des Moines, Iowa, party of the first part, and J. B. Smith & Co., of the city of Des Moines, Iowa, party of the second part,

Witnesseth, that the said J. B. Smith & Co. have agreed to and with the city of Des Moines, and do hereby agree to and with said city, to furnish at their own cost and expense all necessary material and labor to build and construct in a good, firm, substantial and workmanlike manner the following-described paving, to wit: Grand Avenue street, beginning at East Eighteenth street to the Iowa State fair grounds, strictly in accordance with the manner and under the conditions set forth in the plans and specifications hereto attached and made a part of this contract. The said J. B. Smith & Co. hereby agree to commence said work within two days after water pipes are laid, and complete the same in ninety days thereafter, provided said water pipes are laid by August 15, 1892.

It being understood and agreed, in case the said J. B. Smith & Co. shall fail to enter upon the work or to employ sufficient force to complete this contract within the time specified, that, upon the report of said fact to the board of public works, said board may at once take possession of the work and employ sufficient force under a competent foreman to complete the work within the time above specified, or as soon as may be, and the cost of such work shall be paid by the said J. B. Smith & Co.

It being further understood and agreed that the cost of said improvement is assessable against private property, as provided by the ordinances of said city, and that the duty and liability of the city to said J. B. Smith & Co., or to any person claiming under them, shall be confined to its power to impose said assessments and deliver the assessment certificates to said J. B. Smith & Co., or to the persons entitled thereto.

It is further agreed that the board of public works or city engineer may cut into or tear down any work that they may feel
19 satisfied has not been done properly and in accordance with this contract, and if it is ascertained that such work has not been done properly and faithfully executed, the said J. B. Smith & Co. shall pay all the costs of tearing down and cutting into; and for reconstruction. But if said work shall have been properly done in the first place, such expense shall be paid by the city.

It is further agreed that the contractors shall be liable for all injury to persons or property caused by the negligence, mismanagement or fault of themselves or either of them or any of their agents or employés while engaged in the construction of said work, and should the city be sued therefor the contractors or their agents shall be notified of said suit, and thereupon it shall be the duty of the said contractors to defend or settle the same; and should judgment go against the city in such case the city shall recover the amount

with all costs from said contractors and the sureties on their bond shall be jointly liable with them, and the record of said judgment against the city shall be conclusive evidence in the case to entitle the city to recover against said contractors; and the right of action shall accrue to the city as soon as judgment shall be rendered, whether the city shall have paid it or not.

The said J. B. Smith & Co. hereby agree and undertake to perform said work in accordance with the plans and specifications at the following price, to wit: one dollar and sixty cents per square yard (\$1.60), which price shall cover the cost of the entire work, and said cost is to be assessed, as provided by ordinances of said city, against the private property fronting or abutting on the street or streets upon which said improvement is made, and said assessment shall be payable within the time and in the manner as provided by an ordinance of the city relating to making contracts for paving and curbing streets and alleys, and the construction of sewers, and providing for the manner of making and collecting assessments and issuing certificates for the payment thereof, passed February 22nd, 1889.

And it is further agreed that said assessment certificates shall be received by said J. B. Smith & Co., in full payment and compensation for all work done by them under this contract and without recourse to the city of Des Moines.

And it is hereby further agreed between the parties to this contract that the said city of Des Moines shall not be liable in any manner to the said J. B. Smith & Co. for any extras of any kind or nature whatsoever, or for any damages to the said J. B. Smith & Co., which may be caused by their coming in contact with any rock, water, sand, or any other unforeseen material. It being understood

that the contract price herein specified is to be in full payment regardless of any cost or expense that the said J. B.

Smith & Co. may be put to on account of the performance of said work.

It is expressly understood that the above contract shall be approved by the city council before the same shall be binding upon said city and that the water pipes be put in said street before the work shall be commenced by the said J. B. Smith & Co.

In witness whereof, we have hereunto signed our names this 15th day of March, A. D. 1892.

R. S. FINKBINE,

R. L. CHASE,

Board of Public Works.

J. B. SMITH & CO.,

78 La Salle St., Chicago, Ill.

Endorsed on contract: "Approved by city council April 15, 1892.
R. B. Dennis, clerk."

That on June 6, 1894, plaintiff amended his petition by leave of court as follows:

Comes now the plaintiff and for a second amendment to his petition as heretofore amended, states:

That plaintiff is informed and believes, and so alleges the fact to be, that the paving certificates referred to in his original petition and in the amendment thereto, for paving done upon said East Grand avenue opposite the lots owned by plaintiff, under the contract referred to in said petition and amendment, and now owned and held by the Des Moines Brick Manufacturing Company, a corporation organized under the laws of Iowa, with its principal place of business at the city of Des Moines, Polk county, Iowa. Plaintiff therefore makes the said Des Moines Brick Manufacturing Company a party defendant to this suit and alleges as against said defendant all the matters heretofore set out in his original petition and in the first amendment thereto, alleging said matters as against the defendant The Des Moines Brick Manufacturing Company with the same effect as against the original defendants to this suit.

And for relief as against the said Des Moines Brick Manufacturing Company plaintiff prays that each and all of the certificates for paving issued against the property of this plaintiff, described in his original petition, may be canceled and declared to be null and void and be no lien upon or against the lots of this plaintiff described in his said petition; and plaintiff further prays for the relief claimed in his said original petition as amended.

GATCH, CONNOR & WEAVER,
Attorneys for Plaintiff.

(Duly verified.)

21 That original notice in due form was served on each of said defendants, and that they appeared and pleaded as herein-after set out.

On June 2, 1894, the defendants, City of Des Moines, and C. H. Dilworth, county treasurer, filed their demurrer as follows:

Come now the defendants, The City of Des Moines and C. H. Dilworth, treasurer, and demur to the petition of the plaintiff filed in this case and to the amendment thereto, on the following grounds, to wit: That the facts stated in said petition and the amendment thereto do not constitute a cause of action or entitle the plaintiff to the relief demanded, or to any relief whatever.

J. K. MACOMBER,
City Solicitor.

That on October 16, 1894, said defendants filed an answer; but that on final hearing said answer was by consent withdrawn and the cause submitted, so far as said defendants are concerned, upon their demurrer to the petition as amended.

On September 10, 1894, the Des Moines Brick Manufacturing Company filed its answer and counter-claim as follows:

Division first.

Comes now defendant, Des Moines Brick Manufacturing Company, and for answer to the plaintiff's petition on file herein, says:

That it admits that plaintiff is and has been at all times since 1888 the owner of the real property described in paragraph 1 of the petition. Admits that said Central Park was platted in the year 1886 and was not then within the corporate limits of the city of Des Moines, and alleges that from about the year 1886 until it became a part of the city of Des Moines the said Central Park and all of said Grand avenue and the property abutting thereon from Twenty-second street to the fair grounds were within the corporate limits of the incorporated town of Grant Park. Admits and alleges that on or about the first day of April, A. D. 1890, said territory became a part of the city of Des Moines and the corporate boundaries of said city became extended so as to include the whole of said territory. And for further answer in respect to jurisdiction of the city of Des Moines over said territory defendant refers to the second division of this answer and makes the same a part hereof as fully as if set out at length herein. But defendant says that plaintiff cannot 22 in this action question the legality of the annexation of said territory to said city, or question the jurisdiction of the said city over said territory.

Admits that there was assessed against said premises on or about the 12th day of June, 1893, the proportion of the cost of paving East Grand avenue assessable against said property, to wit: the sum of one hundred and forty-eight and $\frac{8}{10}$ dollars against each of said lots, and in the aggregate the sum of eight thousand nine hundred and twenty-eight dollars; and for further answer in respect to said paving and the assessment of the cost thereof defendant refers to its counter-claim herein and makes the same a part thereof as fully as if set out at length herein. That plaintiff did not at the time or place provided by law appear or file objections to said assessment and cannot object thereto on this proceeding.

Defendant denies each and every other allegation in the petition.

Division second.

Defendant for a further answer herein to so much of the petition as attacks the jurisdiction of the city of Des Moines over the territory in question, says:

That the defendant City of Des Moines is one of the cities whose boundaries were extended by chapter 1, Acts Twenty-third General Assembly of Iowa. That within the boundaries of said city as extended was included the territory theretofore in the city of North Des Moines and in the incorporated towns of University Place, Greenwood Park, Sebastopol, Gilbert, Easton Place, Capital Park and Grant Park and other territory not theretofore incorporated. That plaintiff's said property and that part of East Grand avenue east of Twenty-second street were within said incorporated town of Grant Park. That prior to the 15th of March, 1890, the inhabitants of the city of Des Moines and of said suburban city and towns had signified their desire to be incorporated into one municipality, and in one an election was held, in some resolutions were adopted by the council, in some resolutions were adopted by the citizens at public meetings, in some petitions were signed, and in all the

inhabitants had signified their desire for a consolidation of said several cities and towns under one municipal government. That on the first Monday in April, 1890, 1892 and 1894 municipal elections were held for the election of city officers for the enlarged city at which all the electors residing within the boundaries of the enlarged city participated. That the city officers elected at said election in the year 1890 entered into their respective offices on the third Monday in April, 1890, and on said day all the officers of the several cities and towns within the territory of said enlarged city

retired from their several offices and delivered to the said
23 officers of the city of Des Moines all the books, records
and property of said cities and towns. That on the 15th day
of July, 1890, the city council of the city of Des Moines adopted an
ordinance defining the boundaries of said city as enlarged, and as-
serting jurisdiction over all of said territory, a copy of which ordi-
nance is attached to the petition and is now made a part of this
answer. That since said third Monday in April, 1890, the city of
Des Moines and its officers have undisturbed exercised complete
jurisdiction over all of the territory in said enlarged city including
the territory mentioned in the petition and all other territory, both
original and annexed, and among other things have been done the
following: Taxes have been laid and collected, streets have been
improved by grading, curbing and paving, and sewers constructed
and the cost of curbing, paving and sewerage assessed upon abut-
ting property; sidewalks have been constructed, repaired and
cleaned and the cost assessed upon abutting property, water mains
have been laid and water rents paid, highways have been improved
and bridges built, ordinances and board of health regulations have
been enacted and enforced and general police jurisdiction exercised,
and in general all the corporate powers of a city of the first class
have been exercised over all of said territory included within the
enlarged city. That the corporate capacity and jurisdiction of said
city within all of said territory has been recognized and acquiesced
in by the inhabitants of said territory, by the State and county
officers and by the courts and legislature, and among other acts of
the legislature so recognizing said city and its jurisdiction over all
of said territory are chapters 3, 25 and 125, Acts Twenty-third As-
sembly; chapters 1, 2 and 144, Acts Twenty-fourth General Assem-
bly, and chapters 170 and 179, Acts Twenty-fifth General Assembly,
all of which relate to matters in whole or in part within the annexed
territory of the city of Des Moines or to acts done by said city by
virtue of powers derived by or through the extension of its limits.
That plaintiff has by paying without objection city taxes and special
assessments levied by the city of Des Moines upon his said property,
long recognized and acquiesced in the jurisdiction of said city over
said annexed territory.

That on the 10th day of April, 1894, prior to the commencement
of this suit, was passed chapter 12, Acts Twenty-fifth General As-
sembly, and at said date the city of Des Moines was exercising
undisturbed jurisdiction within all of the annexed territory and

within the boundaries defined by said ordinance hereinbefore referred to.

That by reason of the said matters, plaintiff is estopped to deny the jurisdiction of the city of Des Moines over said territory or its jurisdiction to make said assessment complained of, and that plaintiff cannot, in this proceeding, attack or question the corporate character or capacity of the city of Des Moines or its jurisdiction over said territory or its jurisdiction to levy said special assessment.

Division third.

The defendant, The Des Moines Brick Manufacturing Company, for further answer herein and by way of a counter-claim against the plaintiff, C. P. Dewey, says:

Paragraph 1. That this defendant, The Des Moines Brick Manufacturing Company, is a corporation organized under the laws of the State of Iowa, and that the defendant, The City of Des Moines, is a municipal corporation and a city of the first class, organized under the laws of the State of Iowa.

Par. 2. That on the 11th day of May, 1891, and the 1st day of February, 1892, the city council of the city of Des Moines adopted resolutions ordering that East Grand avenue, from East Eighteenth street to the fair grounds or East Thirtieth street, be improved by paving with brick according to the plans and specifications on file in the office of the board of public works of said city.

Par. 3. That on the 15th day of March, A. D. 1892, a contract was entered into by said city of Des Moines, through its board of public works, with J. B. Smith & Co., whereby the said city contracted with the said J. B. Smith & Co., for the paving of said street, and agreed in payment of the cost of said improvement to assess said cost against the abutting property, and to issue and deliver to said J. B. Smith & Co., or their assigns, assessment certificates as provided by law and the ordinances of said city. That said contract was afterward approved by the city council of said city of Des Moines.

Par. 4. That thereafter, the said improvement having been completed by said J. B. Smith & Co., and accepted by the city engineer and board of public works, the board of assessors of said city and the council did, on or about the 19th day of May, 1893, duly assess against the following-described property, to wit: lots numbered 17 to 76, both inclusive, in Central Park, and being the same premises described in paragraph 1 of the plaintiff's petition, and against plaintiff C. P. Dewey, the owner thereof, the sum of one hundred forty-eight and eighty one-hundredths dollars, against each of said lots, and in the aggregate the sum of eight thousand nine hundred twenty-eight dollars, being the *pro rata* share of the cost of said paving done by said J. B. Smith & Co., as aforesaid assessed against said premises, which said assessment was, on the 12th day of June, A. D. 1893, approved and confirmed by resolution adopted by the city council of said city.

Par. 5. That thereupon the said city of Des Moines caused to be

25 issued and delivered to said J. B. Smith & Co., in payment of the cost of said improvement and in accordance with the terms of said contract hereinbefore referred to, sixty assessment certificates, being one certificate for the sum of \$148.80 against each of said several lots. That a copy of one of said assessment certificates is hereto attached, marked Exhibit A and made a part hereof, and that the other fifty-nine of said several assessment certificates are each the same as said Exhibit A in all respects except the description of the lot included therein. That this defendant, The Des Moines Brick Manufacturing Company, is now the owner and holder of all of said several assessment certificates.

Par. 6. That by virtue of the laws of the State of Iowa, and the said assessment and said certificates, the plaintiff, C. P. Dewey, is personally liable and indebted to this defendant in the aggregate sum called for in said certificate, to wit: the sum of \$8,928.00, with interest thereon from the date of said assessment, May 19, 1893, at the rate of ten per cent. per annum until paid, and the further sum of five per cent. upon the amount of said certificates and interest as aforesaid to defray the expenses of collection, and for costs of suit, and that said several sums of money are now justly due and owing from plaintiff to this defendant, and no part thereof has been paid.

Par. 7. That by virtue of the laws of the State of Iowa and said assessment and said certificates, this defendant, The Des Moines Brick Manufacturing Company, has the first and paramount lien for the said several sums mentioned in paragraphs 5 and 6 of this division, together with the costs and accruing costs upon the real estate hereinbefore described, and being the same property described in paragraph 1 of plaintiff's petition, being for the amount of one of said assessment certificates with interest and costs of collection thereon, and for a *pro rata* amount of the other costs and disbursements upon each of the said several lots or pieces of real estate. That said liens attached to said property from the commencement of the work of paving of said street, to wit, from the — day of August, 1892, and is in law superior to all liens upon said premises.

Par. 8. That plaintiff upon the issuance of said certificates and the making of said assessment, failed to avail himself of the right to pay said assessment in installments, and failed to promise or agree in writing endorsed upon said certificates that in consideration of having the right to pay said assessment in installments he would not make any objection of illegality or irregularity as to said assessment, and would pay the same with interest. That by reason of said failure plaintiff never acquired the right to pay said assessment in the installments, and is and was required to pay the same in full when made, and that part of said several certificates which 26 relates to payment in installments never became binding or operative. That the amount of said assessment with interest and expenses of collection, costs and accruing costs as hereinbefore stated, became due and payable when assessed and the first

lien on said premises from the date of said assessment, and no part thereof has been paid.

Wherefore defendant, The Des Moines Brick Manufacturing Company, demands judgment against plaintiff, C. P. Dewey, for said sum of eight thousand nine hundred and twenty-eight dollars (\$8,928), with interest thereon from the 19th day of May, A. D. 1893, at the rate of ten per cent. per annum until paid, and for the further sum of five per cent. upon the whole amount of principal and interest to defray the expenses of collection, and for costs and accruing costs; that defendant's liens upon said several lots be established as of the date of the commencement of said work, to wit, the — day of August, 1892, and that said liens be adjudged to be superior and paramount to the right, title and interest of the plaintiff in and to said real estate, and that the right, title and interest of plaintiff in and to the said real estate be foreclosed and barred; that said real estate be sold to satisfy the said judgment and interest, and expenses of collection and costs and accruing costs, and that for any balance thereof remaining unsatisfied on said sale defendant may have a general execution against the property, rights and credits of the plaintiff; and defendant asks for all such other and further relief as in equity it may be entitled, and thus will ever pray.

GUERNSEY & BAILY,
Attorneys for Defendant, *The Des Moines
Brick Manufacturing Company.*

(Duly verified.)

EXHIBIT A TO COUNTER-CLAIM.

Number 884.	Dollars, 148.80.
-------------	------------------

UNITED STATES OF AMERICA, *The City of Des Moines.*

Assessment Certificate.

STATE OF IOWA, *County of Polk.*

It is hereby certified, that the city council of the city of Des Moines in accordance with the law, and the ordinances of said city, providing for the improvement of streets and alleys by sewerage, paving and macadamizing the same, did on the 1st day of February, 1892, order by resolution that East Grand avenue from Twenty-second street to Thirty-eighth street, be improved by paving; 27 that afterwards, to wit, on the 15th day of April, 1892, a contract was entered into by the city of Des Moines, through the board of public works of said city, and J. B. Smith & Co., and approved by the city council, in which the said J. B. Smith & Co. agreed to make said improvement; that the said improvement having been completed by the said J. B. Smith & Co. and accepted by the city engineer and board of public works, the board of assessors of said city did on the 19th day of May, 1893, duly assess against the following property, to wit: lot 44, Central Park, and against

Chas. P. Dewey, the owner thereof, the sum of (\$148.80) one hundred and forty-eight and $\frac{8}{10}$ dollars, the same being for the *pro rata* share of the cost of said paving assessed against said property, to be paid by the owner thereof. That said assessment was fully approved by the city council and is authorized by the laws of the State of Iowa and is payable immediately unless said Chas. P. Dewey signs the agreement endorsed hereon, in which event it is payable as follows, to wit: one-seventh of said sum, with interest on the whole amount at six per cent., at the first semi-annual payment of taxes next succeeding the aforesaid date of this assessment, one-seventh in one year, one-seventh in two years, one-seventh in three years, one-seventh in four years, one-seventh in five years, and one-seventh in six years from the date of said assessment, with six per cent. interest per annum, payable annually, upon the whole amount remaining unpaid. The amount of said assessment, or any yearly payment thereof, with interest, may be paid at any time to the county treasurer, in the manner and upon the terms provided by the laws of Iowa. No payment shall be made to the holder until the certificate, coupon or coupons so paid are surrendered to the county treasurer. When the last installment is paid this assessment certificate with six per cent. interest from the date of last payment shall represent the last installment, and shall be surrendered in like manner as is above provided for the coupons, and like entries be made and receipts given.

That a plat and schedule showing said assessment have been duly filed in the office of the city clerk, and a duly certified copy thereof delivered to the county auditor, as provided by law, and said assessment will be collected and paid over by the county treasurer in the manner authorized by the laws of said State of Iowa. And the said city of Des Moines hereby transfers to J. B. Smith & Co. or bearer, or their assignis, all its right and interest to, in and with respect to said improvement, and J. B. Smith & Co. or bearer, or their assigns, are hereby authorized to receive, sue for and collect or have collected said assessments by or through any of the methods provided by law for the collection of assessment for such improvements. It is hereby further certified that all the provisions of the law
28 and ordinances of said city respecting the issuance of this certificate have been fully complied with.

In witness whereof, said city has caused these presents to be signed by its mayor and countersigned by the city clerk this 12th day of June, 1893.

[SEAL.]

Countersigned:

C. C. LANE, *Mayor.*

R. B. DENNIS, *City Clerk.*

(The plaintiff, Chas. P. Dewey, never signed the agreement or waiver endorsed on the back of said certificate.)

That on October 1, 1894, the plaintiff filed his reply to the counter-claim of the Des Moines Brick Manufacturing Company, as follows:

Comes now the plaintiff, and for reply to the third division of the

answer of the Des Moines Brick Manufacturing Company, being its counter-claim against plaintiff, says:

Paragraph 1. Plaintiff admits the allegations contained in paragraph 1 of said counter-claim.

Par. 2. Answering paragraph 2 of said counter-claim, plaintiff admits that on the dates mentioned therein some action was taken by the city council of said city with reference to paving East Grand avenue, but plaintiff denies that any action was taken on that subject other than what is set out in plaintiff's petition herein.

Par. 3. Answering paragraph 3 of said counter-claim, plaintiff admits that a contract was made by said city with J. B. Smith & Co., a copy of which is attached to the first amendment to plaintiff's petition and marked Exhibit B; but plaintiff denies that any other or different contract was made or entered into by the said parties in respect to said work.

Par. 4. Answering paragraph 4 of said counter-claim, plaintiff admits the allegations therein contained so far as consistent with the petition of the plaintiff and amendments thereto; but so far as inconsistent with the averments of the said petition and amendments plaintiff denies the same.

Par. 5. Answering paragraph 5 of said counter claim, plaintiff admits the allegations therein contained so far as in harmony with the allegations contained in plaintiff's petition as amended;

29 but so far as the averments in said paragraph conflict with the petition and amendments, plaintiff denies the same; except that plaintiff admits that the said Des Moines Brick Manufacturing Company is the holder of said paving certificates.

Par. 6. Answering paragraph 6 of said counter-claim, plaintiff denies each and every allegation therein contained.

Par. 7. Answering paragraph 7 of said counter-claim, plaintiff denies each and every allegation therein contained.

Par. 8. Answering paragraph 8 of said counter-claim, plaintiff admits that he did not sign the waivers upon said assessment certificates, and denies that he had any knowledge or information that said assessments had been levied or certificates issued; as to the other averments in said paragraph 8, plaintiff denies each and all of said allegations.

Par. 9. Further answering said counter-claim as a whole, and each and every allegation therein contained, plaintiff states: That he reaffirms, and makes part of this paragraph, the allegations contained in paragraphs 1, 3, 5, 6, 6a, 6b, 6c, 7, and 8, and each of said paragraphs, as fully set forth in plaintiff's petition and the first amendment thereto; and plaintiff makes each and all of the allegations contained in said several paragraphs of his petition and amendment a part of this paragraph the same as if specifically and in detail set out and averred herein; and plaintiff prays that the averments of this paragraph, which include substantially all the averments of his original petition herein, may be taken to be the foundation for affirmative relief as against the said Des Moines Brick Manufacturing Company and as grounds for the cancellation of said several paving certificates referred to in said counter-claim.

Wherefore plaintiff prays that the assessments made upon his property hereinbefore described, and the paving certificates issued against said property by said city of Des Moines, may be annulled and declared to be illegal and void, and that the said counter-claim of the said Des Moines Brick Manufacturing Company may be dismissed at its costs, and that plaintiff have the relief prayed for in his original petition.

GATCH, CONNOR & WEAVER,
Attorneys for Plaintiff.

(Duly verified.)

30 That on October 10, 1894, the Des Moines Brick Manufacturing Company, filed its motion to strike from the reply, as follows:

Division I.

Comes now defendant, Des Moines Brick Manufacturing Company, and moves the court to strike out from the reply to the counter-claim of the Des Moines Brick Manufacturing Company the whole of paragraph 9 thereof, for the following reasons:

1. That the allegations thereof are incompetent, irrelevant and immaterial.
2. That the allegations thereof do not constitute a defense or any part of a defense to said counter-claim or any part thereof.
3. That the allegations thereof are the statement of mere conclusions and not the statement of any fact or facts.
4. That plaintiff cannot in this action attack or question the corporate character, boundaries or jurisdiction of the city of Des Moines.
5. That whatever defects or irregularities existed in the organization of the city of Des Moines, or in the extension of its boundaries, or in the annexation of said territory thereto, has been cured by lapse of time and public recognition and acquiescence long before the commencement of this action.
6. That whatever defects or irregularities in the organization of the city of Des Moines, or in the extension of its boundaries, or the annexation of said territory thereto, had been cured, and said organization, extension of boundaries and annexation of territory ratified and confirmed by the provisions of chapter 12, Acts of the Twenty-fifth General Assembly, long before the commencement of this action.
7. That said chapter 1, Acts of the Twenty-third General Assembly, does not in any way contravene or violate any of the provisions of the constitution.
8. That the city having been in fact and without objection exercising jurisdiction over said territory, the said assessment cannot be defeated because of any irregularities or defects in the proceedings under which said city obtained or exercised such jurisdiction.
9. That the plaintiff, having failed to appear and object to said improvement or said assessment at the time and in the manner and at the place provided by law, cannot now be heard to complain thereof in this proceeding.
10. That said improvement having been completed and plaintiff

having failed to pay or offer to pay any part of the cost thereof, he cannot in this proceeding be heard to complain thereof.

31 11. That the determination of the city council of the necessity for said improvement is final and cannot be inquired into in this proceeding.

12. That said improvement having been accepted by the city engineer and board of public works, their determination is final and conclusive upon plaintiff and cannot be inquired into in this action.

13. That the record shows that the notice for proposals complied with the requirements of the statute governing said matter.

14. That the irregularities and defects complained of in the proceedings upon which said assessment is founded are not sufficient to prevent the city from making a valid or binding assessment.

15. That the allegations of fraud or collusion either in respect to the ordering of said improvement or the determination of the necessity therefor are incompetent, irrelevant and immaterial and the statement of mere conclusions and not the statement of any facts.

16. That the allegations of fraud or collusion either in respect to the execution of the work or the acceptance thereof are incompetent, irrelevant and immaterial and the statement of mere conclusions and not the statement of any facts.

Division II.

Defendant, Des Moines Brick Manufacturing Company, moves the court to strike out from the reply to the counter-claim of the Des Moines Brick Manufacturing Company the following part of paragraph 9 thereof, viz: all that paragraph 1 of the petition as incorporated by reference in said reply beginning with the words "but that by the provisions of chapter 1" and ending with said paragraph.

And shows to the court as grounds therefor each and all of the reasons assigned in division 1 of this motion.

Division III.

Defendant, Des Moines Brick Manufacturing Company, moves the court to strike out from the reply to the counter-claim of the Des Moines Brick Manufacturing Company the following part of paragraph 9 thereof, viz: the words "which tax plaintiff has refused to pay claiming the same to be illegal and void for the reasons hereinafter stated" in paragraph 3 of the petition incorporated by reference to said reply.

And shows to the court as grounds therefor each and all of the reasons assigned in division 1 of this motion.

Division IV.

Defendant, Des Moines Brick Manufacturing Company, moves the court to strike out from the reply to the counter-claim of the 32 Des Moines Brick Manufacturing Company the following part of paragraph 9 thereof, viz: the words "that said alleged

tax is a cloud upon the title of the real estate of this plaintiff and the personal property of this plaintiff is liable to *to be illegally seized for the payment of said alleged tax*" in paragraph 4 of the petition incorporated by reference in said reply.

And shows to the court as grounds therefor each and all of the reasons assigned in division 1 of this motion.

Division V.

Defendant, Des Moines Brick Manufacturing Company, moves the court to strike out from the reply to the counter-claim of the Des Moines Brick Manufacturing Company the following part of paragraph 9 thereof, viz: all of paragraph 5 of the petition incorporated by reference in said reply.

And shows to the court as grounds therefor each and all of the reasons assigned in division 1 of this motion.

Division VI.

Defendant, Des Moines Brick Manufacturing Company, moves the court to strike out from the reply to the counter-claim of the Des Moines Brick Manufacturing Company the following part of paragraph 9 thereof, viz: all of paragraph 6 of the petition incorporated by reference in said reply.

And shows to the court as grounds therefor each and all of the reasons assigned in division 1 of this motion.

Division VII.

Defendant, Des Moines Brick Manufacturing Company, moves the court to strike out from the reply to the counter-claim of the Des Moines Brick Manufacturing Company the following part of paragraph 9 thereof, viz: all of paragraph 6a of the petition incorporated by reference to said reply.

And shows to the court as grounds therefor each and all of the reasons assigned in division 1 of this motion.

Division VIII.

Defendant, Des Moines Brick Manufacturing Company, moves the court to strike out from the reply to the counter-claim of the Des Moines Brick Manufacturing Company the following part of paragraph 9 thereof, viz: all of paragraph 6b of the petition incorporated by reference in said reply.

And shows to the court as grounds therefor each and all of the reasons assigned in division 1 of this motion.

Defendant, Des Moines Brick Manufacturing Company, moves the court to strike out from the reply to the counter-claim of the Des Moines Brick Manufacturing Company the following part of paragraph 9 thereof, viz: all of paragraph 6c of the petition incorporated by reference in said reply.

And shows to the court as grounds therefor each and all of the reasons assigned in division 1 of this motion.

Division X.

Defendant, Des Moines Brick Manufacturing Company, moves the court to strike out from the reply to the counter-claim of the Des Moines Brick Manufacturing Company the following part of paragraph 9 thereof, viz: all of paragraph 7 of the petition incorporated by reference in said reply.

And shows to the court as grounds therefor each and all of the reasons assigned in division 1 of this motion.

Division XI.

Defendant, Des Moines Brick Manufacturing Company, moves the court to strike out from the reply to the counter-claim of the Des Moines Brick Manufacturing Company, the following part of paragraph 9 thereof, viz: all of paragraph 8 of the petition incorporated by reference in said reply.

And shows to the court as grounds therefor each and all of the reasons assigned in division 1 of this motion.

GUERNSEY & BAILY,
Attorneys for D. M. Brick Mfg. Co.

The following stipulation was filed in said cause:

It is hereby stipulated and agreed between the parties to the above-entitled suit:

1. That plaintiff qualifies and amends his petition and reply herein as follows: That in paragraph 6 of the petition, in the first sentence of said paragraph, the words, "in law" may be inserted after the word "were," so that the sentence will read: "That the resolutions to pave said street and the order directing said work to be done were in law oppressive, collusive, fraudulent and void." The words "in law" may also be inserted in the sentences near the middle and at the close of said paragraph 6 to qualify the words "in collusion with said society and its directors," and the words "fraudulently and collusively and oppressively." The said words "in law" may also be inserted to qualify the allegations of fraud and collusion in paragraph 6c of the petition. The plaintiff concedes that the city council believed it had the power to improve said street for the purpose and under the circumstances alleged; and plaintiff will not claim, by the allegations made in the petition or reply, actual or intentional fraud or collusion on the part of the city council or board of public works, but only fraud and collusion in law as shown by the facts set out.

And plaintiff qualifies paragraph 9 of his reply, making the allegations of the petition a part of such reply, by reference to the foregoing amendments to and qualifications of the allegations of the said petition.

2. It is further stipulated and agreed that the motion of the Des Moines Brick Manufacturing Company to strike from the reply shall be considered as applying to the petition and the reply as above amended and qualified, and as if said motion had been filed after the above changes in the petition and reply were made; and the

said motion to strike shall be given effect as a demurrer to the paragraphs and portions of paragraphs assailed by said motion, as amended and qualified by this stipulation.

Dated this — day of January, 1895.

GATCH, CONNOR & WEAVER,
Attorneys for Plaintiff.

J. K. MACOMBER AND
GUERNSEY & BAILY,
Attorneys for Defendants.

The final

Decree

was as follows:

Now, to wit, on this 18th day of November, 1895, being a day of the regular November, 1895, term of this court, this cause coming on to be heard, Gatch, Connor & Weaver appearing for plaintiff, J. K. Macomber for the defendants, City of Des Moines and C. H. Dilworth, treasurer, and Guernsey & Baily for defendant, Des Moines Brick Manufacturing Company, and the parties having filed herein a written stipulation, thereupon by consent of parties the defendants, City of Des Moines and C. H. Dilworth, county treasurer, withdrew their answer and refiled herein their demurrer to the petition as amended and as affected by said stipulation, and the court having heard the arguments of counsel, and being fully advised in the premises, sustained said demurrer, to which ruling plaintiff excepted

and elected to stand upon his petition, and refused to plead further. It is therefore considered, adjudged and decreed

that as to defendants City of Des Moines and C. H. Dilworth, county treasurer, the plaintiff's petition be and it is dismissed on the merits, and that said defendants have and recover from plaintiff the costs of this action as taxed by the clerk, and that execution issue therefor. To all of which plaintiff at the time duly excepted.

Thereupon this cause further came on to be heard on the motion of defendant, Des Moines Brick Manufacturing Company, to strike from plaintiff's reply to the answer and counter-claim of said Des Moines Brick Manufacturing Company, setting out in substance the same facts alleged in plaintiff's petition as amended, and the court having heard the arguments of counsel and being fully advised in the premises sustained said motion. To which ruling plaintiff at that time duly excepted and elected to stand upon his pleadings and refused to plead further.

Afterward on said day this cause further came on to be heard and tried upon the counter-claim of defendant, Des Moines Brick Manufacturing Company, when said defendant offered in evidence the sixty special assessment certificates described in defendant's answer and counter-claim and sued on herein, to which plaintiff objected on the grounds alleged in his petition and reply. Thereupon the court having inspected the pleadings, heard the evidence and arguments of counsel and being fully advised in the premises, finds that the allegations of the answer and counter-claim of defendant, Des Moines Brick Manufacturing Company, are true and that the equities

are with said defendant and that it is entitled to judgment and decree as prayed against each of the several lots described in the answer and counter-claim for the sum of one hundred and forty-eight and $\frac{8}{10}$ dollars (\$148.80) with interest thereon from the 12th day of June, 1893, at the rate of ten per cent. per annum and to a collection fee equal to five per cent. of the said sums, and that said defendant is entitled to judgment against plaintiff personally for the aggregate amount of said several sums, to wit: eighty-nine hundred and twenty-eight dollars (\$8,928), the amount of said several assessments, and the further sum of twenty-one hundred seventy-two and $\frac{4}{10}$ dollars (\$2,172.48), being interest thereon from the 12th day of June, 1893, at the rate of ten per cent. per annum, and the further sum of five hundred fifty-five and $\frac{2}{10}$ dollars (\$555.02) collection fee, together with interest thereon from the 18th of November, 1895, and the costs of this action, to all of which plaintiff excepted.

It is therefore considered, adjudged and decreed that defendant, Des Moines Brick Manufacturing Company, have and recover from the plaintiff, C. P. Dewey, the sum of eleven thousand six hundred fifty-five and $\frac{5}{10}$ dollars (\$11,655.50) with interest thereon from the 18th day of November, 1895 (being the amount of said special assessments with interest from the date of the assessment at the rate of ten per cent. per annum and a collection fee equal to five per cent. of said assessments and interest), and in addition thereto the costs of this action as taxed by the clerk.

It is further considered, adjudged and decreed that by virtue of said assessment and the judgment thereon defendant, Des Moines Brick Manufacturing Company, has a first and primary lien upon each of said several lots described in said answer and counter-claim and in said several special assessment certificates, to wit: lots No. seventeen (17) to seventy-six (76), both inclusive, in Central Park, now included in and a part of the city of Des Moines, being for one-sixtieth of the total amount of said assessments and interest, collection fee and costs, to wit: for the sum of one hundred ninety-four and $\frac{2}{10}$ dollars (\$194.26) with interest from the 18th day of November, 1895, and costs upon each of said lots, and the said liens are hereby enforced and foreclosed upon said real property against said plaintiff.

It is further ordered, adjudged and decreed that a special execution issue for the sale of said real property or so much thereof as may be necessary to satisfy the foregoing judgment and interest and costs and accruing costs; that the said lots be offered and sold separately and that upon the expiration of one year from the date of such sale the equity of redemption of plaintiff in said real property be forever barred, and upon the execution of the sheriff's deed the title thereto vest absolutely in the purchaser at the said sale or his assignee.

It is further ordered and adjudged that for any balance of said judgment, interest or costs remaining unsatisfied after return of said special execution, a general execution issue against the plaintiff.

To all of which and each part thereof plaintiff at the time duly excepted.

Thereafter, on November 23, A. D. 1895, the plaintiff, in due form of law, perfected his appeal from said decree, and from each separate provision thereof, and served notice of appeal in proper form to the supreme court on each of said defendants, and on the clerk of the district court of Polk county, and secured to said clerk his fees for transcript, and filed said notice of appeal, with proof of service thereof duly made and accepted by said clerk and by each of
37 said defendants, in said clerk's office, on the 25th day of November, A. D. 1895.

Assignment of Errors.

And this appellant avers that the district court erred, and that such error is manifest upon the face of the record, to all of which appellant duly excepted, in this:

1. The court erred in sustaining the demurrer of the city of Des Moines and C. H. Dilworth, treasurer, to plaintiff's petition as amended, upon the alleged ground that no cause of action was stated therein, when as matter of law it was shown by said petition as amended that said special assessment and the contract for the paving of the street were illegal on three separate grounds, to wit:

First. The city council had no power to pave the street in question at the expense of abutting property and its owners, including the plaintiff herein and his said lots, solely for the benefit and convenience of the State Fair Association and its directors, and when such paving was not required for the health or convenience of the residents of said street or the public generally; and said improvement and special assessments under the circumstances alleged and admitted were fraudulent, oppressive and void.

Second. The contract for the paving of said street and the special assessment to pay for such work were illegal and void for the further reason that the published proposals to bidders for said work were not in substantial compliance with the statute in the particulars specified in paragraphs 6a and 6b of the petition as amended; and said published proposals to bidders failed to state the extent of the work, when the work should be begun, or at what time such proposals would be acted upon, as the statute specifically required as conditions precedent to the making of a valid contract for paving streets; and for that reason also the assessments were illegal.
38

Third. That the alleged annexation to the city of Des Moines of the territory which included the lots of plaintiff, under chapter 1, Acts Twenty-third General Assembly (1890), was illegal and void, said statute being a local and special law and in contravention of the constitution of Iowa, as alleged in paragraphs 7 and 8 of plaintiff's petition; and said city of Des Moines had no jurisdiction to improve said street or to levy the special assessment in question, for that reason on plaintiff's said lots.

2. The court erred in sustaining the motion of the Des Moines Brick Manufacturing Company to strike from plaintiff's reply to its counter-claim the matters therein alleged, which included substan-

tially all the allegations of the petition as amended; for the reason that said city of Des Moines had no power to pave said street, or jurisdiction over it, and the contract and assessment were illegal and void, upon the grounds and by reason of the matters specified in the first assignment of errors herein under the specifications "first," "second" and "third," which specifications are also made part of and included in this second assignment of errors.

3. The court erred in rendering a decree in favor of said Des Moines Brick Manufacturing Company for the amount of said special assessments, and making the same a lien on plaintiff's said lots, for each and all of the reasons set out and specified in the first and second assignments of error setting forth the invalidity of said contract and tax or assessment, and also the want of jurisdiction of the city of Des Moines to improve said street at the cost of the owners of abutting property, including this plaintiff. Said specifications designated "first," "second" and "third," are made part of this assignment of errors.

39 & 40 4. The court erred in holding and deciding that plaintiff was personally liable to said Des Moines Brick Manufacturing Company for so much of said special tax or assessment as could not or would not be realized by a sale of the sixty lots in question on special execution, and in ordering and adjudging that a general execution should issue against plaintiff and in favor of said Des Moines Brick Manufacturing Company for the balance of such tax or assessment; and further that, as plaintiff was at all times a non-resident of the State of Iowa and had no personal notice or knowledge of the assessment proceedings, that the imposition of a personal liability against him, in excess of the value of all the lots, was not due process of law and was in contravention of the provisions on that subject of the fourteenth amendment to the Constitution of the United States, as well as in contravention of the provisions of the constitution of the State of Iowa on the same subject.

5. The court erred in holding and adjudging that plaintiff or his property was liable to said Des Moines Brick Manufacturing Company for ten per cent. interest and five per cent. collection fee, without notice to plaintiff of the issuance of said paving certificates and opportunity afforded him to sign the waiver and obtain the statutory period to pay such assessment.

Notice of Oral Argument.

Notice is hereby given that counsel for appellant will argue this cause orally in the supreme court, as specified by the rules thereof.

GATCH, CONNOR & WEAVER,
Attorneys for Plaintiff and Appellant.

41 And said cause was submitted to said supreme court on the foregoing record at the October term thereof, 1896, and on the 7th day of April, 1897, said court filed its opinion (decision) in writing, the same being in the words and figures, following, to wit:

In the Supreme Court of Iowa.

Filed April 7, 1897.

C. P. DEWEY, Appellant,
vs.CITY OF DES MOINES, C. H. DILLWORTH, Treasurer of Polk County,
and DES MOINES BRICK MANUFACTURING COMPANY, Appellees. }

Appeal from Polk district court, Hon. C. P. Holmes, judge.

This is an action in equity begun in April, 1894, to set aside a special assessment for paving East Grand avenue, in the city of Des Moines, between Eighteenth street on the west and the State fair grounds on the east, upon which street and between the points named plaintiff's lots abut. Certificates were issued to the contractors doing the work and were by them assigned to the defendant The
42 Des Moines Brick Manufacturing Company.

The latter company filed an answer and a counter-claim against plaintiff and the lots in question to foreclose the certificates. Plaintiff replied to the counter-claim, presenting the same facts which were pleaded in the petition. The brick company filed a motion to strike one paragraph of the reply.

The parties then agreed that said motion should be treated as a demurrer and considered as referring also to the portions of the petition which are embodied in the paragraph of the reply assailed. It was also agreed that the allegations of fraud in plaintiff's pleadings should be so changed as to eliminate any charge of fraud in fact. The case was tried and a decree entered against the plaintiff, and he appeals.

Gatch, Connor & Weaver, for appellant.

Guernsey & Baily, for appellee The Des Moines Brick Manufacturing Company.

J. K. Macomber, for the City of Des Moines and Dillworth.

KINNE, C. J.:

1. We proceed to a consideration of the questions involved
43 in this appeal in the order in which they are presented by the appellant. The first claim is that the city had no power to pave the street in question at the expense of the abutting property-owners, and that the improvement and special assessments were fraudulent, oppressive, and void. It is to be remembered that under the agreement of the parties plaintiff does not claim that there was any actual or intentional fraud or collusion on the part of the city council or board of public works, but only fraud and collusion in law, as shown by the facts pleaded.

Counsel elaborately argue this question, and present many authorities in support of their claim. We cannot consider in this opinion in detail all of the cases cited. We can only determine from an examination of them what the law applicable to the question is and announce it, with a reference to the cases and a brief statement of the reasons for our holding.

The power of the city council to determine whether such improvements shall be made is undoubtedly, indeed counsel do not dispute it; but they insist that the exercise of such power is subject to review by the courts. The rule of law is that where a municipal body, like a city council, is invested with power to make improvements like those in controversy in this action, the necessity for making such improvements is a matter for the exclusive determination of such body, and when such body acts within the authority given, and its determination is fairly made—that is, without fraud or oppression—it cannot be interfered with by the courts.

44 City of Muscatine *vs.* Railway Co., 88 Iowa, 291; 55 N. W. Rep., 100.

Everett *vs.* City of Council Bluffs, 46 Iowa, 66.

Brewster *vs.* City of Davenport, 51 Iowa, 427; 1 N. W. Rep., 737.

Coates *vs.* City of Dubuque, 68 Iowa, 550; 27 N. W. Rep., 750.

City of Burlington *vs.* Quick, 47 Iowa, 222.

Brown *vs.* Barstow, 87 Iowa, 344; 54 N. W. Rep., 241.

Des Moines Gas Co. *vs.* City of Des Moines, 44 Iowa, 509.

Dillon on Municipal Corporations, section 94.

The question, then, is, Did the body act within the power given, and was its determination to make the improvements fairly made—that is, without fraud or oppression? It is insisted that under the facts disclosed in this record that the council acted fraudulently and oppressively. The facts upon which plaintiff predicates his claim of fraud in law are in substance these: that the improvements were ordered at the instance of the directors of the State Agricultural Society and because they would be of great benefit to said society in holding its annual fairs. It can make no difference as to who instigated the proceedings as to their legality. The question is, as we shall hereafter see, as to the necessity for the improvements. Plaintiff alleges that from the western point where said improvements commence to the extreme eastern point at the fair ground was a distance of over one mile, and that in that entire distance there are no buildings fronting upon said street save four inexpensive houses, and that some of them were not there when the street was ordered paved.

45 That all of the property-owners on both sides of said street between said points were opposed to said improvements being made at their expense, and that there was no necessity therefor "so far as the property or interests of the persons owning property along the side of the street are concerned."

The necessity for the work must be determined from all of the facts and circumstances and from the public use of the street.

Here was a public street within the limits of a populous city, and it appears from the allegations of the pleadings that it was opened as a public highway by the board of supervisors in 1886 and prior

to the time the territory embracing it was added to the city; 46 that plaintiff's lots were platted and the plat filed in 1886; that in 1890 this territory became a part of the city, and in 1891 the city council ordered the *the* improvements made; that the street was improved and worked by the proper authorities from 1886 to 1890; that it was used largely by vehicles passing between the main portion of the city and the fair grounds; that it was a dirt road and dusty in dry weather; that large numbers of people visit the fair each year, and this street is and has been the most direct and convenient highway to said grounds for wagons, horses, and cattle, and for persons having them in charge. It fairly appears that this street had been a public thoroughfare ever since it was first opened. How extensively it had been used by the public generally, except at fair times, does not appear. In the absence of allegations of actual or intentional fraud on the part of the council, it clearly appears from the foregoing facts that no improper benefit was contemplated by that body in its action. The only benefit arising from the improvements, aside from that accruing to the abutting lot-owners, was that which would accrue to the general public in having adequate accommodations on and over this street.

Counsel for appellant seem to measure the necessity for 47 these improvements solely by the wants and necessities of the abutting lot-owners. This is not the true or only test of such necessity; if it was, then it may well be doubted whether half of the streets in the city of Des Moines would ever be paved, curbed, or sewered.

It is a fact known to all men at all conversant with such matters that, as a rule, property-owners object to such improvements because they entail a great expense which must be borne by them, and the benefits arising from them accrue not only to the lot-owners, but likewise to the general public. In the absence of allegations to the contrary it may well be assumed that this street was used by people from the country as a means of access and egress to and from the city. For aught that appears, it was in constant use by citizens. There is no allegation that it was not so used and we are not warranted in saying that it was not because of the allegation that the improvements were unnecessary so far as the abutting lot-owners were concerned. It appears that the property-owners protested against the improvement.

It would seem, therefore, that it must have been ordered after a full hearing and consideration. As we have said, it does not appear how much this street was used except during fair time, nor 48 does it appear to what extent the territory adjacent to the street, but not immediately abutting upon it, is settled or occupied, nor whether the people, if any, living within such territory use this street. Now, the use of the street, whether at fair time or at other times, by non-residents is a public use, and in a proper sense just as much for city purposes as its use by people living upon it, or by those living within the territory contiguous to it, or by those who may live in the country and use it in going to and from the business portion of the city. The obligation of the city to

maintain its streets in proper repair is no less to non-residents who may use them than it is to residents of the city. Its liability for an injury by reason of its negligence in keeping the street in repair would be the same in either case. Under all of the facts recited in the petition we discover no reason for saying that the action and determination of the council was not fairly made, nor does it appear that it was made under such circumstances as that it can properly be said that their action was oppressive.

True, it is oppressive in its effect in the sense that all public improvements which involve the expenditure of large sums of money by property-owners are felt to be oppressive, but that is not 49 the oppression which will warrant us in overturning the action of the proper municipal body which has acted within its powers and fairly and without any fraudulent view or intent.

Such burdens, when fairly laid, must be borne, and their necessity is not to be determined alone by their effect upon or the amount of burden thereby cast upon the property-owner.

If in fact such improvements be required for the public good the burden is one necessarily incident to the ownership of property in cities. We have said that the necessity for the improvement is not to be determined alone from its benefit to the abutting lot-owners. We do not consider it necessary to enter into an elaborate discussion of the question as to whether or not a special assessment must be based in part even upon the idea of a benefit to be actually received by the abutting property. It is sufficient to say that it has been repeatedly held by this court that such improvements of streets is a public object which will support such an assessment regardless of the fact of whether or not it is a benefit to the abutting property.

Warren vs. Henley, 31 Iowa, 31.

Morrison vs. Hershey, 32 Iowa, 271.

Gatch vs. City of Des Moines, 63 Iowa, 718; 18 N. W. Rep., 310.

50 *City of Muscatine vs. Railway Company*, 88 Iowa, 291; 55 N. W. Rep., 100.

We regard the law upon this question as settled in this State.

2. It is next contended that the contract for paving the street and the special assessments to pay for said work were illegal and void, for the reason that the published proposals to bidders for said work were not in substantial compliance with the statute, in that said proposals failed to state the extent of the work, when the work should be begun, and at what time said proposals would be acted upon. To determine this question it is necessary to first ascertain what statute was in force at the time the improvements in controversy were ordered and contracted for. Chapter 168, Acts of the 21 G. A., which took effect on April 20, 1886, prescribed the manner in which contracts for paving should be let, and provided, among other things, that *that* there should be an advertisement for bids, which should contain "a description of the kind and amount of work to be done and material to be furnished as nearly accurate as practicable."

Chapter 1 of the Acts of the 22 G. A. provided for the creation of a board of public works and authorized them to make contracts for public improvements, and section five of the act provided
51 that the board shall advertise for bids when the amount of the work is in excess of \$200.00 and expressly provides that the proposals shall state the amount and different kinds of material to be furnished and kind of improvement and the time and conditions upon which bids shall be received; also that it shall not be necessary before proposals are published or bids received to determine specifically the kind of material to be used. It is also provided that all contracts made by the board shall be subject to the approval of the city council. This law went into effect on July 4, 1888. Prior to the taking effect of the act creating the board of public works chapter five of the Acts of the 22 G. A. took effect (April 21, 1888), which amended chapter 168, Acts of the 21 G. A., and provided that the public advertisement for bids should state the kind and amount of work to be done and specify the different kinds of material for which bids should be received. April 18, 1890, chapter 14 of the Acts of the 23 G. A. took effect. Section three of that act provided for sealed proposals after giving public notice which was required to state "as nearly as practicable the extent of the work, the kind of materials to be furnished, when the work shall be done, and at what time the proposals shall be acted upon." This

act was originally applicable only to cities acting under special charters. By chapter 12, Acts 24 G. A., in force April 5, 1892, chapter 14, Acts of the 23 G. A., was made applicable to all cities having a population of over four thousand, and hence applied to the city of Des Moines. The resolution of the city council ordering these improvements made was passed May 11, 1891; also a like resolution on February 1, 1892. The notice for proposals for this paving was published between February 8, 1892, and February 27, 1892, and the material part thereof is as follows:

"Sealed proposals will be received by the board of public works of the city of Des Moines at their office, in the city hall, until 12 o'clock noon, February 29, 1892, for paving with brick East Grand avenue from Eighteenth street to the west line of the fair grounds, according to the plans and specifications for said work now on file in our office." * * * March 15, 1892, the contract was awarded by said board to J. B. Smith & Co. and a contract was signed by the parties on the same day; said contract contained the following provision: "It is hereby expressly understood that the above contract shall be approved by the city council before the same shall be binding upon said city." April 15, 1892, said contract was approved

by the city council. From the foregoing facts it will be observed that after the passage of the two resolutions by the council and the publication of the proposals by the board of public works and the reception of the bids and the making of the contract by the board with Smith & Co., chapter 14 of the Acts of the 23 G. A. which had been passed in 1890, and was only applicable to cities acting under special charters, became by virtue of chapter 12 of the Acts of the 24 G. A. which went in force April 5,

1892, applicable to the city of Des Moines, and that after it was so in force the contract previously made for the improvements by the board of public works was approved by the city council. The question is therefore presented as to whether the contract for the paving was so completed prior to April 5, 1892, as that it was not affected by the act of the 23 G. A., or must its validity be determined with reference to the provisions of said last-mentioned act? Appellant's claim that, as the contract had not been approved by the city council prior to the taking effect of the act of the 23 G. A., it had no binding force as a contract, and that all that had been done amounted simply to a proposition on the part of the contractor to do the work upon certain terms, and as before the contract was in fact approved the prior act was repealed, all the proceedings were ineffective, and the new statute prescribed the conditions under which such street improvements should thereafter be made.

54 It must not be forgotten that chapter 5 of the Acts of the 23 G. A., which was in force when the council ordered the work done, when the notice was published, when the bids were received, and the contract signed, did not require the contracts of the board of public works for paving to be made subject to the approval of the city council. That act expressly authorized said board to make such contracts in the name of the city, to make a completed contract which would be binding upon the city without any act of approval of the council; but the same legislature passed the act creating the board of public works, in which act it was provided that all contracts made by the board should be subject to the approval of the city council. This act was approved April 9, 1888, but took effect on July 4, 1888. The other act, which did not require such contracts to be approved by the council, was approved April 16, 1888, and took effect April 21, 1888.

It is therefore the later declaration of the legislative will, although it took effect about seventy days earlier than the other act. We should, if possible, so construe these two acts as to give both of them force and effect. This may be done by holding that the proper preliminary steps had been taken, and that the board of

55 public works had power to enter into the contract binding the city for curbing, paving, and sewer ing without any approval of the city council; but in case of other contracts such approval was necessary. The advertisement of the board did, as we have seen, contain the provision that the contract was subject to the approval of the city council. Under the construction we have given to these two statutes this provision of the contract was wholly unnecessary. Having full power by statute to enter into a contract for this work which would bind the city as well as the contractor, the provision requiring the approval of the city council was contrary to the legislative intent and inoperative. The fact that thereafter the council did approve of the contract in no way affected it.

As no approval was necessary, the contract was complete and binding prior to the taking effect of the act of the 24 G. A., which made the act of the 23 G. A. applicable to the city of Des Moines.

Therefore said act of the 23 G. A. is not applicable to the case

presented. The advertisement of the board sufficiently complied with the statute applicable thereto.

3. The decree orders a special execution for the sale of the lots and provides for the issuance of a general execution against the plaintiff to make any balance which may remain after exhausting the property on the special execution. It is claimed

that the statute does not authorize such a decree, and that the liability of the plaintiff ends when his property subject to the assessment has been exhausted in payment of it. We considered this question of personal liability recently in the case of *Farwell vs. Des Moines Brick Manufacturing Company*, 66 N. W. Rep., 177, and held that such a decree and personal liability was warranted and authorized by the statute. On reconsidering the question in the light of the exhaustive arguments in this case, we are still content with our former holding.

4. Counsel urge that the imposition of such a personal liability in excess of the value of the property is in violation of the State and Federal constitutions. This same question as to our State constitution was raised and considered in *City of Burlington vs. Quick*, 47 Iowa, 226, and it was there held that such personal liability was not in contravention of the constitution and might be enforced. Reliance is placed upon *Newman vs. Smith*, 50 Mo., 529, and *Palmer vs. Taylor*, 31 California, 240. Both of these cases were considered in the case cited from the Forty-seventh Iowa and held not applicable. *Penoyer vs. Neff*, 95 U. S., 714, was a case involving the question whether a personal judgment could be rendered

57 against a non-resident upon service by publication alone, and it was held it could not be. *Craw vs. Village of Tolono*, 96 Ill., 255, involved the construction of a provision of the constitution of the State of Illinois materially different from that of our State. Three of the justices dissented from the opinion. Neither of these cases sustain appellant's contention.

It is said that plaintiff is a non-resident; that he was not served with notice, and that to render such a personal judgment is taking his property without due process of law. The law under which these proceedings were had was a public statute, of which all persons interested, whether residents or non-residents, were bound to take notice. He must be presumed to have known that this improvement might be made; he is charged with notice of it, and if he had any defense to interpose he should act timely.

He is presumed to know that the statute authorized a personal judgment for the amount of such improvements. Having subjected himself to the jurisdiction of the courts of this State and invoked their aid, he is in no position to say that because a personal judgment has been entered against him in conformity with the laws of this State he is thereby being deprived of his property without due process of law. Without setting out the provisions of the

58 State and Federal constitutions relied upon, we may say that they are substantially the same.

The Supreme Court of the United States defines due process of law to mean "that there can be no proceeding against life, liberty,

or property which may result in the deprivation of either without the observance of those general rules established in our system of jurisprudence for the security of private rights."

Hurtado *vs.* California, 110 U. S., 536; 4 Sup. Ct. Rep., 111.

Hagar *vs.* Reclamation Dist., 111 U. S., 701; 4 Sup. Ct. Rep., 667.

Davidson *vs.* New Orleans, 96 U. S., 97.

In the last case cited it is said:

"And lastly and most strongly it is urged that the court rendered a personal judgment against the owner for the amount of the tax, while it also made it a charge upon the land. It is urged with force, and some highly respectable authorities are cited to support the proposition, that, while for such improvements as this a part or even the whole of a man's property connected with the improvement may be taken, no personal liability can be imposed upon him in regard to it. If this were a proposition coming before us sitting in a State court, or perhaps in a circuit court of the United States, we might be called upon to decide it, but we are unable to see that any of the provisions of the Federal Constitution authorizes us to reverse the judgment of a State court on that question. It is not one which is involved in the phrase 'due process of law,' and none other is called to our attention in the present case."

State *vs.* Certain Lands in Redwood County (Minn.), 42 N. W. Rep., 473:

59 Evidently the judgment is not open to the objection urged, that it is a taking of property without due process of law. There is no force in the claim that plaintiff did not have notice. As we have said, he is bound to know that authorized public improvements may be made, and the courts are always open for the prevention of any wrongful exercise of such power.

We have considered all of the questions argued by counsel and arrive at the conclusion that the decree of the district court was in all respects proper.

Affirmed.

60 And on the same day a final judgment was rendered in said cause, the entry thereof being in the words and figures following, to wit:

C. P. DEWEY, Appellant,
v.
CITY OF DES MOINES, C. H. DILLWORTH, Treasurer of Polk County, and Des Moines Brick Manufacturing Co., Appellees.

Appeal from Polk District Court.

In this cause the court, being fully advised in the premises, file their written opinion affirming the judgment of the district court.

It is therefore considered by the court that the judgment of the court below be, and it is hereby, affirmed, and that a writ of *procedendo* issue accordingly.

It is further considered by the court that the appellant pay the costs of this appeal, taxed at \$98.75, and that execution issue therefore."

60½ And afterwards there were filed in the office of the clerk of said court writ of error, bond, and citation, and the same are hereto attached in original form and transmitted herewith as part of this transcript, true copies thereof being retained in the office of the said clerk.

61 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the honorable the judges of the supreme court of the State of Iowa, Greeting:

[Seal of the Supreme Court of the United States.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit, between C. P. Dewey, appellant, and The City of Des Moines, C. H. Dilworth, treasurer of Polk county, and The Des Moines Brick Manufacturing Company, appellees, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution

62 or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said appellant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

United States, the 28th day of May, in the year of our Lord one thousand eight hundred and ninety-seven.

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—

DAVID J. BREWER,

*Associate Justice of the Supreme Court
of the United States.*

[Endorsed:] Clerk supr. c't: Please file this as of day rec'd by you. Filed Jun-1, 1897. C. T. Jones, clerk supreme court.

63 Know all men by these presents that we, Charles P. Dewey, as principal, and Charles T. Killen, as surety, are held and firmly bound unto City of Des Moines, C. H. Dilworth, treasurer of Polk county, and Des Moines Brick Manufacturing Company in the full and just sum of twelve thousand (\$12,000) dollars, to be paid to the said City of Des Moines, C. H. Dilworth, treasurer of Polk county, and Des Moines Brick Manufacturing Company, certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 26th day of May, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas lately, at a term of the district court of Polk county, Iowa, in a suit depending in said court between Charles P. Dewey, plaintiff (designated as C. P. Dewey), and City of Des Moines, C. H. Dilworth, treasurer of Polk county, and Des Moines Brick Manufacturing Company, defendants, a judgment was rendered against the said Charles P. Dewey (designated in-said suit as C. P. Dewey), and upon appeal by said Charles P. Dewey to the supreme court of Iowa said judgment was affirmed, and the said Charles P. Dewey having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said City of Des Moines, C. H. Dilworth, treasurer of Polk county, and the Des Moines Brick Manufacturing Company, citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such that if the said Charles P. Dewey shall prosecute his error proceedings to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

CHARLES P. DEWEY. [SEAL.]
CHARLES T. KILLEEN. [SEAL.]

Sealed and delivered in presence of—

GEO. W. KEMP.

WM. L. K. SMITH.

Allowed as supersedeas by—

DAVID J. BREWER,

Associate Justice of the Supreme Court of the United States.

May 28th, '97.

NORTHERN DISTRICT OF ILLINOIS, ss:

I hereby certify that I have sworn and examined the principal and surety of the within bond and find them sufficient security therefor.

Chicago, May 26, 1897.

[Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.]

S. W. BURNHAM, *Clerk.*

[Endorsed:] Filed Jun- 1, 1897. C. T. Jones, clerk supreme court.

64 UNITED STATES OF AMERICA, ss:

To the City of Des Moines, C. H. Dilworth, treasurer of Polk county, and the Des Moines Brick Manufacturing Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Iowa, wherein C. P. Dewey is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this 28th day of May, in the year of our Lord one thousand eight hundred and ninety-seven.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

65 Due and legal service of the within citation, with copy, is hereby accepted at Des Moines, Iowa, this third day of June, A. D. 1897.

J. K. MACOMBER,
*Attorney for City of Des Moines and C. H. Dilworth,
Treasurer of Polk County, Iowa.*
N. T. GUERNSEY,
*Successor to Guernsey & Baily, Att'ys for Des Moines
Brick Manufacturing Company.*

Witness:

WILLIAM CONNOR.

[Endorsed:] Filed Jun- 1, 1897. C. T. Jones, clerk supreme court.

66 STATE OF IOWA, ss:

I, C. T. Jones, clerk of the supreme court of Iowa, do hereby certify that the foregoing is a full, true, and correct transcript of

the record, decision, and final judgment in the case of C. P. Dewey, plaintiff in error, against City of Des Moines, C. H. Dilworth, tres., and Des Moines Brick Manufacturing Company, defendants in error.

And I further certify that the original writ of error, bond, and citation are hereto attached and made a part of the return to said writ of error, and this return is made in obedience to said writ.

Seal of the Supreme Court of Iowa. In testimony whereof witness my signature and official seal this 7th day of June, 1897.

C. T. JONES,
Clerk Supreme Court Iowa.

[Endorsed:] Supreme Court U. S. Received Jun- 10, 1897.
Clerk's office.

67 In the Supreme Court of the United States, October Term, 1897.

C. P. DEWEY, Plaintiff in Error, }
 vs. }
CITY OF DES MOINES, C. H. DILWORTH, Treasurer of Polk County, Iowa, and Des Moines } Error to Supreme
Brick Manufacturing Company, Defendants } Court of Iowa.
in Error.

Assignments of Error.

The above plaintiff in error makes the following assignments of error as grounds for the review of a certain final judgment in the supreme court of Iowa in the above-entitled cause, made and entered at the October, 1896, term of said court, to wit, on the 7th day of April, 1897, the said court being the highest court of the said State of Iowa and the highest and last court of said State to which said cause could be carried by said plaintiff in error.

It appears from the record in said cause, and especially from the pleadings, stipulations, and findings of the trial court therein, that the plaintiff in error is and at all times since the pendency of the proceeding complained of has been a citizen and resident of the city of Chicago, State of Illinois.

That he was and is the owner in fee-simple of sixty lots in a certain subdivision called "Central Park," said lots being numbered consecutively from (17) seventeen to (76) seventy-six, inclusive; that said Central Park was surveyed and platted into lots, and said plat filed in the office of the county auditor of Polk county, Iowa (the county in which said lots are situated), in the year 1886; that when

68 said Central Park was platted and divided into lots said lots were situated outside of the corporate limits of the city of Des Moines; that by the provisions of chapter one, Acts 23 G. A. of Iowa, 1890, it was claimed that Central Park and other

territory in the neighborhood, being two and one-half miles eastward of the former boundary of said city, were annexed to and became a part of the city of Des Moines, but the plaintiff in error has at all times maintained that said alleged annexation was illegal and void.

It further appears that in the month of May, 1891, the city council of Des Moines declared that it was necessary to pave and curb East Grand avenue and proceeded by contract to pave and curb East Grand avenue from 18th street to the State fair grounds; that the lots belonging to the plaintiff in error lie abutting to said East Grand avenue; that as his share of the cost of said paving and curbing there was assessed against the said lots of the plaintiff in error the aggregate sum of \$8,928.00, which was made a lien on said lots; that the plaintiff in error has always refused to pay said assessment, claiming the same to be illegal and void, and on April 30th, 1894, brought a suit in equity in the district court of Polk county to set aside said special assessment for paving and curbing.

Judgment was rendered against the plaintiff in error in the district court, and upon appeal to the supreme court of Iowa the final judgment of said district court was in all things ratified and confirmed by the supreme court of Iowa and became and is in effect the final judgment of said last-named court.

It appears by stipulation and demurrer that the defendants in error admitted the following facts:

First. That the plaintiff in error had no actual notice or knowledge of the action of the city council aforesaid until he applied, in 1894, to the county treasurer of Polk county for a statement 69 of his general taxes on said lots, and no constructive knowledge except such as might be offered by publications in newspapers in the city of Des Moines.

Second. That the amount of said taxes for paving and curbing is greater than the reasonable market value of said lots, whether considered singly or otherwise, the assessment against each particular lot being greater in amount than the value of said lot and the aggregate assessment being greater in amount than the reasonable market value of all of said lots taken together.

Third. That at the time of the making of such assessment the city council of Des Moines well knew that the costs of paving and curbing said street would exceed the market value of the abutting lots owned by the plaintiff in error and others.

Fourth. That the defendants in error are seeking to enforce against the plaintiff in error not merely a sale of said lots, but also to compel him to pay the full amount of said tax, regardless of whatever sum said lots may be sold for and regardless of their actual value.

Fifth. That said paving and curbing *was* ordered solely on account of the supposed benefit which would accrue to the State Agricultural Society in holding its annual State fair.

Sixth. That there was no actual necessity for paving or curbing said street, so far as the property or interests of persons residing or owning property along said street was concerned.

Seventh. That for more than a mile on said street on that part on which plaintiff's lots abutt there are only four small and cheap houses, and some of them were not built when the paving and curbing was ordered.

Eight. That along said street, in the space mentioned, there are no stores, shops, factories, or buildings of any description whatever except the four houses mentioned.

70 Ninth. That all the property-holders on both sides of the street between 18th street and the State fair grounds, a distance of more than a mile, were opposed to the paving and curbing of said street at the expense of the abutting property.

Tenth. That said city council, at the solicitation and sole instance and for the benefit alone of the State Agricultural Society and its directors, when there was no actual necessity or real occasion therefor otherwise, passed said resolutions declaring the existence of a necessity for —, and ordered said paving to be done, and approved and accepted said work, and levied said tax, and is now seeking to enforce the same against the property of the plaintiff in error and of others abutting on said street.

The district court of Polk county, Iowa, by its judgment sustained the validity of said tax and rendered a personal judgment against the plaintiff in error for the sum of \$11,655.50, with interest from November 18th, 1895, and decreed that for any balance of said judgment remaining unsatisfied after the sale of said sixty lots a general execution shall issue against the plaintiff in error. This judgment and decree was in all respects confirmed by the judgment of the supreme court of Iowa.

In such judgment and decree there is manifest error, in this, to wit:

First. The levy and enforcement by lien of said paving tax, for the sole benefit of the public, upon the property of the plaintiff in error to an amount equal to or exceeding the value of the same is a taking of private property for public use without just compensation, in violation of the fifth amendment of the Constitution of the United States and section 18, article one, of the constitution of the State of Iowa.

Second. That the imposition of a personal liability against 71 the plaintiff in error for any amount of said tax unsatisfied after the sale of the said lots is not due process of law, and is in violation of the fourteenth amendment of the Constitution of the United States.

Third. That the said judgment is not sustained or procured by due process of law, for the reason that the supreme court of Iowa, in case of *State ex rel. West vs. City of Des Moines*, 65 N. W. Rep., 818, has formally adjudged and decreed that the act of annexation under and by authority of which said paving tax was assessed is unconstitutional and void, of which judgment this court will take judicial notice, and therefore all acts of the city officers by virtue of said statute are void.

Wherefore said plaintiff in error respectfully prays that the said judgment of the supreme court of Iowa against him may be re-

versed, modified, vacated, or set aside, as may appear to be required by law.

ANDREW E. HARVEY,
Solicitor for Plaintiff in Error.

Endorsed on cover: Case No. 16,608. Iowa supreme court. Term No., 395. C. P. Dewey, plaintiff in error, vs. The City of Des Moines, C. H. Dilworth, treasurer of Polk county, and The Des Moines Brick Manufacturing Company. Filed June 11, 1897.

1^o. 995. 122. FEB 7 1898
JAMES H. MCKENNEY
Brief of Cobb & Harvey for P. E.

Filed Febⁿ 7, 1898.

Supreme Court of the United States.

OCTOBER TERM, 1897.

NO. 395.

C. P. DEWEY,

Plaintiff in Error.

vs.

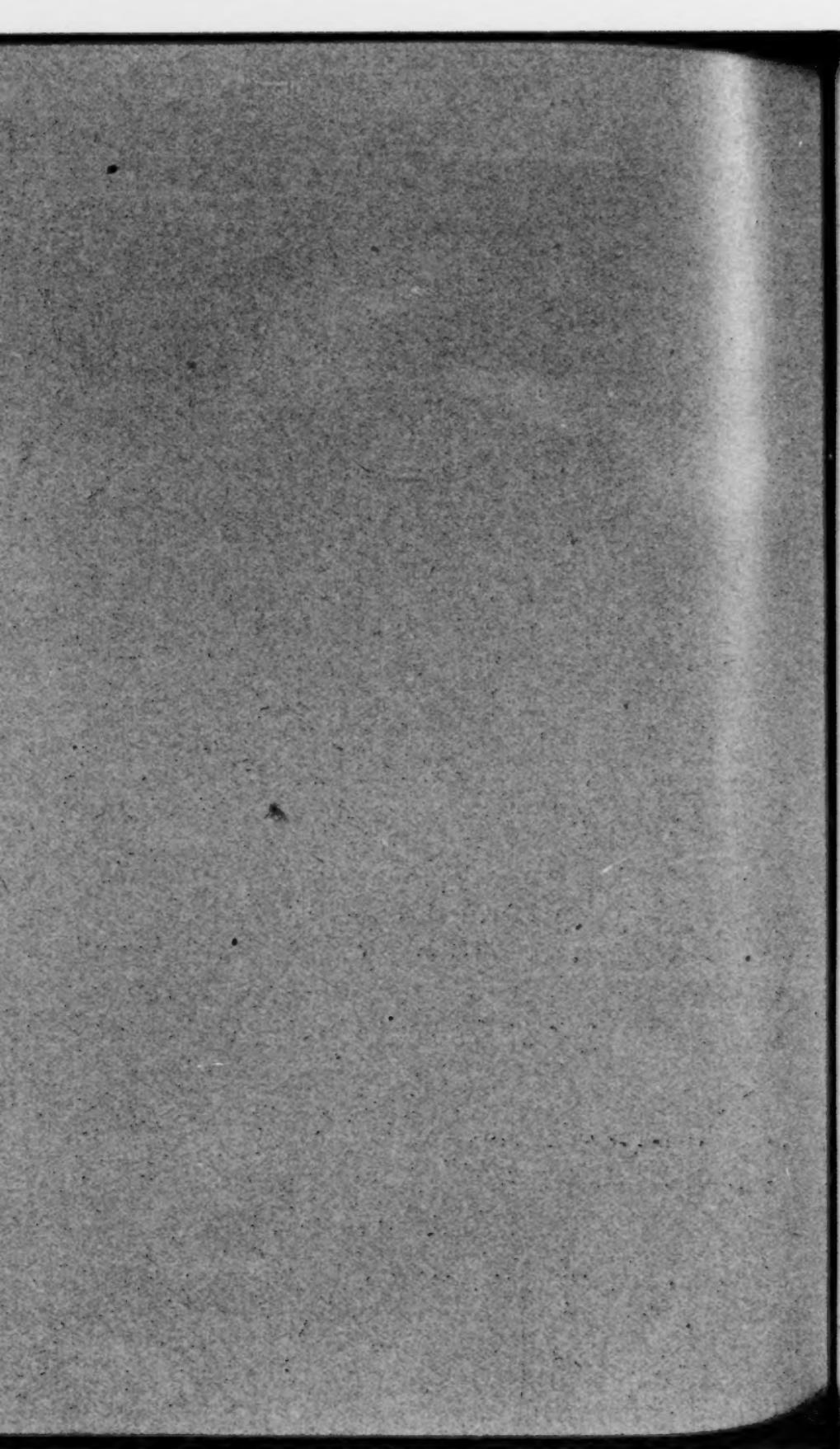
CITY OF DES MOINES, C. H. DILWORTH,
COUNTY TREASURER OF POLK COUNTY,
AND DES MOINES BRICK MANUFACTURING COMPANY;

Defendants in Error.

IN ERROR TO THE SUPREME COURT OF
THE STATE OF IOWA.

BRIEF IN BEHALF OF THE PLAINTIFF IN ERROR.

AMASA COBB,
ANDREW E. HARVEY,
Attorneys for Plaintiff in Error.



In the Supreme Court of the United States.

OCTOBER TERM, 1897.

C. P. DEWEY,

Plaintiff in Error,

vs.

CITY OF DES MOINES, C. H.
DILWORTH, County Treas-
urer of Polk County, and DES
MOINES BRICK MANU-
FACTURING COMPANY,

Defendants in Error.

No. 395.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA—BRIEF IN BEHALF OF THE PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

We follow substantially the plaintiff in error's statement of facts in the supreme court of Iowa.

In the year 1888 C. P. Dewey, the plaintiff in error, who was then and now is a citizen of the state of Illinois, residing in Chicago, became the owner of sixty lots situated in the county of Polk, state of Iowa, and near to but outside the then corporate limits of the city of Des Moines.

By provisions of chapter one of the laws of 1890, (Record Page 11,) the territory in which these lots were situated was annexed to the city of Des Moines. (See Record, Page 15.) About one year after said annexation the city council of the city of Des Moines passed certain resolutions providing for the paving and curbing of a street called East Grand Avenue. (Page 2, Record.) Said resolutions were as follows:

"It is hereby declared necessary that East Grand Avenue from Eighteenth street to the State Fair Grounds be improved by paving and curbing."

"That the board of public works be instructed to advertise for bids for curbing and paving East Grand Avenue from Eighteenth street to the State Fair Grounds, the same to be curbed with artificial stone and paved with brick."

The lots belonging to plaintiff abut directly upon the said East Grand Avenue thus ordered to be paved, he having thirty situated upon the north side of the said street and thirty lots situated upon the south side of the said street, each lot having a frontage of forty feet and an average depth of one hundred thirty-seven and one-half feet. March 15, 1892, the said council of the city of Des Moines entered into a contract for the paving and curbing of the said street, (Record Page 16) and the work was actually done. When the work was completed there was assessed against each of said lots the sum of \$148.80, the cost of paving alone, and against the entire sixty lots the sum of \$8,928.00, which sum with ten per cent interest added amounted at the time of the decree to be herein-after mentioned to the sum of \$11,655.50. By the terms of the certificates which were issued to the contractors the sum specified, that is to say \$148.80 for each lot, was as-

sessed against the lots and also against the plaintiff in error, the owner, as a personal debt. On the 30th day of April, 1894, the plaintiff in error began a suit in equity in the district court of Polk county, Iowa, having for its object the setting aside of said special assessment for paving. The certificates which had been issued to the contractors for doing the work had been assigned to the Des Moines Brick Manufacturing Company, one of the defendants in said suit. Said brick company filed a counter-claim against the plaintiff in error, and the lots in question, to foreclose the certificates. (Record, Pages 18-23.) As will be shown later, the allegations in the plaintiff's bill were by demurrer and stipulation admitted to be true. We cannot better describe the exact grievance of the plaintiff in error in his suit than by quoting in full paragraph six of his bill in the district court, which is as follows:—(Record, Pages 3, 4, 5.)

"That the resolution to have said street and the order directing said work to be done were oppressive, collusive, fraudulent and void. That in the year 1886 the highway now called East Grand Avenue was laid out and opened under the order and directions of the board of supervisors of Polk county, Iowa. That said highway was laid out and opened one hundred feet wide and was at that time in a fair condition for public travel. That said highway between the points designated in the resolution of the city council as Eighteenth street on the west and the fair grounds on the east was worked and improved between 1886 and April, 1890, so that it became a first-class country road and was traversed largely by vehicles passing from the city to the State Fair Grounds and returning, during the four years last mentioned. That in 1886 the fair grounds of the State Agricultural Society of Iowa were established about one mile east of the eastern limits of the city of Des Moines as then established, and that said high-

way now known as East Grand Avenue was thereafter largely used and traveled in reaching said fair grounds and there was no complaint or objection to such roadway, except that it was somewhat dusty in dry weather.

"That in the year 1890, when the attempt was made to extend the eastern limits of the city of Des Moines two and one-half miles farther to the east, as hereinafter set out, the directors of the State Agricultural Society solicited the city council of Des Moines to cause East Grand Avenue to be curbed and paved from Eighteenth street, being near the eastern limit of said city before such annexation, eastward to the State Fair grounds, the reason assigned being the great benefit which would accrue to said State Agricultural Society in holding its annual State fair. That there was no real necessity for paving or curbing said street between Eighteenth street and the State Fair Grounds, so far as the property or interests of persons residing or owning property along said street were concerned. *That the distance between the points just mentioned is something over one mile, but in that entire distance and on both sides of said street there are now only four small and inexpensive houses, and some of them were not built when the street was ordered improved in 1891.* That along said street on both sides, between the points just mentioned, there are no stores, shops, factories or buildings of any description whatever, except only the four small dwelling houses just mentioned; and the owners of said four improved lots were opposed to the paving of the street. That all the property owners on both sides of said street, between Eighteenth street and the State Fair Grounds, were opposed to the paving and curbing of said street at the expense of abutting property, and many of said owners protested to the city authorities against such improvement; but that said city council at the solicitation and sole instance, and for the benefit alone of the State Agricultural Society and

its directors, *when there was no actual necessity or real occasion therefore otherwise*, passed said resolutions of necessity and ordered said work to be done, and approved and accepted said work, and levied said tax, and is now seeking to enforce the same against the property of the plaintiff and of others abutting upon said street. And plaintiff alleges that the State Agricultural Society, a private corporation under the laws of Iowa, holds a fair on its grounds lying immediately east of Twenty-eighth street in such alleged extended limits of said city, on or about the first week of September in each year; that large numbers of people visit such fair each year from all sections of the state, and that East Grand Avenue is and has been the most direct and convenient highway to said fair grounds for wagons, horses and cattle and persons having them in charge. That under the circumstances aforesaid, and at the solicitation of the directors of said State Agricultural Society, the said city council, *desiring to aid said Agricultural Society, and well knowing that the paving of said highway was unnecessary except alone for the purpose aforesaid, and well knowing that such paving would be of no benefit to the owners of abutting property and was unnecessary for any city use or purpose, or for the use or purpose of the people living along said street or living in any other portion of the city, and also well knowing that the cost of the paving alone* (which was ordered to be paved forty-two feet in width along said street), aside from the cost of curbing and sidewalks, *would largely exceed the market value of abutting lots one hundred and fifty feet in depth*; knowing all these matters, nevertheless, the said city council, fraudulently and collusively and oppressively, and to the great oppression and wrong of plaintiff and other owners of abutting property along said street, ordered the same to be curbed and paved as aforesaid and caused said work to be done, and assessed the entire cost thereof against the owners of abutting property along said street."

The plaintiff in error had no actual notice or knowledge of the resolution of the city council to pave said street, or said improvement until after the completion and acceptance of the work, nor did he have any such notice or knowledge until he applied to the county treasurer of Polk county for a statement of the general taxes upon his said property in the month of March, 1894. In the bill of plaintiff in error there is the further allegation in paragraph six:

"That the amount of said tax is greater than the reasonable market value of said lots, whether considered singly or together; the assessment against each particular lot being greater in amount than the value of such particular lot, and the aggregate assessment being greater in amount than the reasonable market value of all of said lots taken together; and that said defendants are seeking to enforce as against plaintiff not merely a sale of said lots, but also to compel plaintiff to pay the full amount of said tax regardless of whatever sum said lots may be sold for, and regardless of the actual value of the same."

As before stated the Brick Company filed an answer, and counter-claim being based upon the above certificates issued to the contractors in payment for the work. There was no denial in the answer of the matters alleged in the petition which are now relied upon and the averments of the counter-claim were controverted by the reply filed by plaintiff in which the matters pleaded in the petition are in substance repeated as the defense thereto. The Brick Company then filed a motion to strike out as presenting no cause of action in favor of the plaintiff, nor in defense as against its counter-claim. (Record, Pages 26, 27, 28, 29). By the stipulation filed in the case it was agreed that the motion to strike should be given the same effect as a demurrer to the paragraphs and portions of paragraphs

assailed by said motion as amended and qualified by the stipulation. The motion to strike which was sustained by the court struck out every material allegation in the petition and reply, conceding them to be true in fact, but adjudging each and all of them to be insufficient in law to afford plaintiff any relief as against the assessment in question. The defendants, the city of Des Moines and C. H. Dilworth, treasurer, demurred to the bill on the general equitable ground that the facts stated therein did not entitle plaintiff to the relief demanded, or to any relief whatever, and the demurrer was sustained.

It is of no consequence whether the case is presented upon the general demurrer to the petition filed by the city of Des Moines and treasurer, or upon the motion to strike filed by the Brick Company. By the terms of said stipulation (Record, Pages 29, 30), the plaintiff's bill and his reply to the counter-claim of the Brick Company were so modified as to eliminate therefrom the allegations as to actual fraud and collusion, and to substitute an allegation of fraud in law instead of an allegation of fraud in fact. In other words that the said authorities and the contractors knew of the facts stated in the pleadings on behalf of plaintiff, and ordered the contract and improvement solely to facilitate travel along East Grand Avenue to the State Fair Grounds, but they had no fraudulent intention in fact in ordering the paving of the street or in doing the work, under the circumstances above stated. Upon the trial of the case in the district court no evidence was adduced except the introduction and filing of the certificates sued upon under the cross-petition, and the case was submitted to the court upon the pleadings and stipulation above mentioned. The court gave to the Brick Company a decree on November 18, 1895, against the plaintiff in error for \$11,655.50 and the petition of the plaintiff in error was dismissed on the merits as to the

other defendants. (Record, Pages 30-32). By the provisions of the decree the plaintiff in error is made personally liable for the payment of the total assessment, regardless of the value of the property, the provisions upon that subject in the decree being as follows:

"It is therefore considered, adjudged and decreed that defendant, Des Moines Brick Manufacturing Company, have and recover from the plaintiff, C. P. Dewey, the sum of \$11,655.50, with interest thereon from the 18th day of November, 1895, (being amount of said special assessments with interest from the date of the assessment at the rate of ten per cent per annum and a collection fee equal to five per cent of said assessment and interest), and in addition thereto the costs of this action as taxed by the clerk."

After providing for a sale of the lots to satisfy the aforesaid judgment, the decree then proceeds:

"It is further ordered and adjudged that for balance of said judgement, interest or costs remaining unsatisfied after return of said special execution, a general execution shall issue against the plaintiff."

The plaintiff in error appealed to the Supreme Court of the state of Iowa, and among others, made the following assignment of error: (Record, Page 33).

"The court erred in holding and deciding that plaintiff was personally liable to said Des Moines Brick Manufacturing Company for so much of said special tax or assessment as could not or would not be realized by a sale of the sixty lots in question on special execution, and in ordering and adjudging that a general execution should

issue against plaintiff and in favor of said Des Moines Brick Manufacturing Company for the balance of such tax or assessment; and further that, as plaintiff was at all times a non-resident of the state of Iowa and had no personal notice or knowledge of the assessment proceedings, that the imposition of a personal liability against him, in excess of the value of all the lots, was not due process of law and was in contravention of the provisions on that subject of the fourteenth amendment to the constitution of the United States, as well as in contravention of the provisions of the constitution of the state of Iowa on the same subject."

Upon the hearing in the said Supreme Court the decree and judgement of the District Court of Polk county was in all things confirmed, whereupon the plaintiff in error brings his cause to this court for relief.

UNDER THE FACTS SHOWN IN THE RECORD
THE ASSESSMENT OF THE ENTIRE COST
OF PAVING EAST GRAND AVENUE UPON
THE ABUTTING PROPERTY OF THE
PLAINTIFF AND OTHERS, AMOUNTS TO
THE TAKING OF PRIVATE PROPERTY
FOR PUBLIC USE WITHOUT COMPENSA-
TION, AND IS THEREFORE A DENIAL OF
THAT "DUE PROCESS OF LAW" WHICH
IS GUARANTEED BY THE FOURTEENTH
AMENDMENT TO THE CONSTITUTION OF
THE UNITED STATES.

Before entering into the discussion of the above proposition I will briefly recapitulate the most salient and pertinent facts shown by the record. It is admitted by the pleadings together with the stipulation that the

assessment was made at the special instigation of the said State Agricultural Society of Iowa.

That there was no particular need of said paving for general public purposes.

That to increase the comfort and convenience of citizens desiring to attend the State Fair each year said paving was ordered and the costs thereof assessed entirely upon the abutting property owners.

That none of the owners of said abutting property desired said improvements, but on the contrary many of them having knowledge of the improvement in contemplation protested strongly against it.

That for more than a mile of said street on that part of it on which plaintiff's lots abut there are only four small and cheap houses, and some of them were not built when the paving and curbing was ordered.

That the said council of the city of Des Moines, at the time said work was ordered, well knew that the cost of said work would exceed the value of the property upon which the brunt of paying for said improvements was placed.

That said paving and curbing was ordered solely on account of the supposed benefit which would accrue to the said State Agricultural Society in holding its annual State Fair.

That there was no actual necessity for paving or curbing said street so far as the property or interests of persons residing or owning property along said street was concerned.

That by the judgement of the District Court, which was in all things affirmed by the Supreme Court of Iowa, the cost of paving and curbing the street fronting upon the lots belonging to plaintiff in error was made a personal judgement against him, thus appropriating the entire property and providing for a general execution against plaintiff in error to recover whatever deficiency there should be after selling his lots.

The counsel for plaintiff in error in the State Court seem to have relied upon one single proposition only as involving a Federal question, to-wit: "As plaintiff was at all times a non-resident of the state of Iowa, and had no personal notice or knowledge of the assessment proceedings, that the imposition of the personal liability against him in excess of the value of all the lots was not due process of law and was in contravention to the provisions on that subject of the fourteenth amendment to the constitution of the United States."

The writer can discover no reason for thus limiting and narrowing down this constitutional Federal question to the mere fact that the plaintiff in error was a non-resident of the state of Iowa, and had no personal notice or knowledge of the assessment proceedings, and that the imposition of the personal liability against him *in excess of the value of all the lots* was not due process of law. While the fact that the plaintiff in error did not actually have notice of the contemplated imposition of an assessment lien upon his property, may be, and doubtless is, of some importance, still in the writer's opinion it is but a minor issue. It is in fact of small importance for the purposes of this discussion whether the plaintiff in error was a citizen of Iowa or Illinois, whether he had, or did not have, notice of the pendency of the assessment proceedings. The mere fact that the city council has made an assessment

upon his property which it knew at the time of the making of the same, exceeded in cost the fair market value of the property to be assessed was a violation of the fourteenth amendment to the constitution of the United States. While it may be that this court would not inquire into the proportion or extent to which property has been benefitted by local improvement, and will not interfere when the sole question is to what extent the abutting property has been benefitted, I think it ought, and will, declare that an assessment for local improvements equal to or exceeding the actual value of the property assessed is a gross violation of the very principle upon which all assessments are based, to-wit, the increased value caused thereby to the abutting property, and that it constitutes the taking of private property for public use without compensation.

In DILLON ON MUNICIPAL CORPORATIONS, third edition, section 761, will be found the following statement of the law :

"Special benefits to the property assessed, that is benefits received by it in addition to those received by the community at large, is the true and only just foundation upon which local assessments can rest, and to the extent of special benefits it is everywhere admitted that the legislature may authorize local taxes or assessments to be made. Local improvements can be assessed upon particular property only to the extent that it is specially and peculiarly benefitted, and since the excess beyond that is a benefit to the municipality at large it must be born by the general treasury."

To the same effect is the ruling of Mr. Justice Sharwood in Hammett vs. Philadelphia, 665 Pa., R. 146:

"Local assessments can only be constitutional when imposed to pay for local improvements clearly conferring special benefits upon the property assessed, and to the extent of these benefits ; they cannot be imposed when the improvement is either expressed or appears to be for the generel benefit."

We would not go to the extent of claiming that an assessment which nearly equals the value of the property assessed, and which exceeds the benefits conferred upon the abutting property would necessarily furnish a case for the interposition of this court on the ground that there had been a denial of due process of law, however obnoxious such an assessment would be to general principles of law, but when it is admitted, as in this case, that the imposition of the assessment amounts to the confiscation of the entire property which the plaintiff in error has in the abutting lots, it is clearly taking of private property for public use without compensation and therefore a denial of due process of law, and a case deserving of relief from this court.

We cite authorities sustaining the doctrines laid down in Dillon's Municipal Corporations, as follows :

- City of Raleigh vs. Peace*, 14 S. E., 521.
- Cain vs. Commissioners*, 71 N. C.
- Cooleys Constitutional Limitations*, Sec. 506.
- 1st Hare American Constitutional Law*, 286 to 315.
- Elliott on Roads and Streets*, 369, 370 and 371.
- Higgins vs. Ausmuss*, 77 Mo., 351.
- Neenan vs. Smith*, 50 Mo., 525.
- Macon vs. Patty*, 57 Miss., 378.
- Craw vs. Tolons*, 96 Ill., 255.
- Gaffney vs. Gaugh*, 36 Cal., 104.
- Baptist Church vs. McAtee*, 8 Bush, 508.

- Burlington vs. Quick*, 47 Iowa, 226.
Green vs. Ward, 82 Va., 324.
Louisiana vs. Miller, 66 Mo., 457.
Virginia vs. Hall, 96 Ill., 278.
Taylor vs. Palmer, 31 Cal., 240.
Seattle vs. Yerter, 1 Wash. Ter., 576.
Thomas vs. Gains, 35 Mich., 155.
Crawford vs. People, 82 Ill., 557.
Waterpower Company vs. Green Bay, etc., etc., 142 U. S., 254.

But this amazing decree of the Iowa court is not satisfied, and does not stop, with the appropriation and virtual confiscation of all of the plaintiff in error's interest in his said lots, and notwithstanding the fact that the record shows that the lots were not sufficient in value to pay for the cost of the improvement, the court orders the sale of the lots, judicially knowing that the proceeds would fall far short of paying in full the cost of assessment made against said lots, and decreed that after the application of the proceeds of said lots a general execution should run against the property of the defendant wherever found in the jurisdiction of the said courts of Iowa which carried with it the right to sue upon said judgment in the courts of Illinois, where the plaintiff in error resides, or in any other state where he has property, and having obtained a judgment thereupon to levy upon any property of the plaintiff in error which might be situated therein.

A perusal of the opinion of the Supreme Court of Iowa shows that that court, while not attempting to evade the force of these facts, nor denying the resulting hardships, contends that this taking of the property of the plaintiff in error does not amount to a denial of due process of law, and holds that he is without remedy. It is clear that said court relies upon the case of *Davidson vs. New Orleans*, 96 U. S., 97, to sustain its position.

It must be admitted that certain portions of the opinion of Mr. Justice Miller in this case seem to justify the interpretation placed upon it by the Supreme Court of Iowa, and had not this court in a later decision unmistakably expressed a contrary doctrine, we would feel that our only hope for success in this case would rest upon the presumptuous expectation of obtaining a reversal by this court of its decision in *Davidson vs. New Orleans*.¹ I will quote briefly the two paragraphs mentioned. On page 105, 96 U. S., the opinion says:

"If private property be taken for public uses without just compensation, *it must be remembered that, when the fourteenth amendment was adopted, the provision on that subject, in immediate juxtaposition in the fifth amendment with the one we are construing, was left out, and this was taken.* It may possibly violate some of those principles of general constitutional law, of which we could take jurisdiction if we were setting in review of a Circuit Court of the United States, as we were in *Loan Association vs. Topeka* (20 Wall. 655). But however this may be, or under whatever other clause of the Federal Constitution we may review the case, it is not possible to hold that a party has, without due process of law, been deprived of his property, when as regards the issues affecting it, he has, by the laws of the state, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case."

And on page 106 the opinion says:

"And lastly, and most strongly, it is urged that the court rendered a personal judgement against the owner for the amount of the tax, while it also made it a charge upon the land. It is urged with force, and some highly respectable authorities are cited to support the proposition,

that while for such improvements as this a part, or even the whole, of a man's property connected with the improvement may be taken, no personal liability can be imposed on him in regard to it. If this were a proposition coming before us sitting in a State court, or, perhaps, in a Circuit Court of the United States, we might be called upon to decide it; but we are unable to see that any of the provisions of the Federal Constitution authorizes us to reverse the judgement of a State Court on that question. *It is not one which is involved in the phrase "due process of law,"* and none other is called to our attention in the present case."

We have studied these two paragraphs very carefully, and we can extract from them no other suggestion except that the distinguished jurist said, that, because that provision in the fifth amendment of the constitution of the United States forbidding the taking of private property for public use without compensation was omitted from the fourteenth amendment, therefore such a prohibition was not operative upon the several states, and second, that the taking of private property for public use without compensation is not a denial of true process of law, and therefore in such a case there was nothing in the record raising a Federal question. In view of the great mass of respectable authorities to the contrary on this question we cannot but think that the language quoted was inadvertently used and was not intended to express the views which its plain import would convey. Indeed it would seem that Mr. Justice Bradley in his concurring opinion does not give the construction to the language of Mr. Justice Miller that is given to it by the Supreme Court of Iowa, and which we admit may fairly be given, for he says on page 107, 96 U. S. :

"It seems to me that private property may be taken

by a state without due process of law in other ways than by mere direct enactment, or the want of a judicial proceeding. If a state, by its laws, should authorize private property to be taken for public use without compensation (except to prevent its falling into the hands of an enemy, or to prevent the spread of a conflagration, or, in virtue of some other imminent necessity, where the property itself is the cause of the public detriment), I think it would be depriving a man of his property without due process of law. The exceptions noted imply that the nature and cause of the taking are proper to be considered. The distress warrant issued in the case of *Murray's Lessee et al. vs. Hoboken Land and Improvement Co.* (18 How. 272) was sustained, because it was in consonance with the usage of the English government and our state governments in collecting balances due from public accountants, and hence was 'due process of law'. But the court in that case expressly holds that 'it is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative, as well as on the executive and judicial, power of the government, and cannot be so construed as to leave Congress free to make any process, due process of law, by its mere will,' p. 275. We think, therefore, we are entitled under the fourteenth amendment, not only to see that there is some process of law, but 'due process of law,' provided by the State law when a citizen is deprived of his property; and that in judging what is 'due process of law,' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law'; but if found to be arbitrary, oppressive and unjust, it may be declared to be not 'due process of law.' Such an examination may be made without interfering with that large discretion which every legislative power has of making wide

modifications in the forms of procedure in each case, according as the laws, habits, customs, and preferences of the people of the particular State may require."

In this language by Mr. Justice Bradley is contained "all of the law and the prophets."

In the case of *Scott vs. City of Toledo*, 36 Fed. Rep., 385, Mr. Justice Jackson, in his admirable and exhaustive discussion of the question we are now considering, did not construe the language of Mr. Justice Miller as conveying the meaning which the Supreme Court of Iowa and the writer has placed upon the excerpts which we have quoted from Mr. Justice Miller's opinion. Mr. Elliott, in his work on Roads and Streets, however, adopts the construction which the Supreme Court of Iowa has adopted, and says in so many words that Mr. Justice Miller has held that the taking of private property for public use without compensation does not constitute a denial of due process of law.

It is not profitable to pursue this branch of the subject any further, in view of the later decisions of this court, and our only excuse for having occupied so much space upon it is to show that the Supreme Court of Iowa evidently denied relief to the plaintiff in error because of the construction it gave to the above quoted language of Mr. Justice Miller. Upon the general question under discussion we beg leave to call the court's attention to the above mentioned case of *Scott vs. City of Toledo*, 36 Fed. Rep., 385. For the convenience of the court we will quote liberally from the excellent opinion in that case where all the authorities that we would otherwise quote ourselves, are carefully and effectively marshalled by Mr. Justice Jackson. Commencing on page 391 he says:

"Counsel for complainants, on this branch of the case,

submit for consideration, upon the facts, two leading and general questions of law:

- "(1) May a municipal corporation appropriate private property for the purposes of a public highway, and compel the owner thereof to repay to the corporation, by an assessment upon his remaining property, not only the entire amount which it has paid him for the property appropriated, but also the costs and expense of ascertaining that amount, and the damages resulting to such remaining property from the taking of the property appropriated?
- (2) May private property be appropriated for public uses, and a charge levied to pay therefor, without affording the person whose property is to be charged a time, place, or tribunal where he may be heard, before the liability for such charge is finally established, and the amount thereof definitely fixed?"

"Upon the first proposition it is insisted on behalf of complainants that compensation for private property taken for public uses is an essential element of that 'due process of law' without which the citizen cannot be lawfully deprived of his property. For the defendant it is claimed that 'the fourteenth amendment does not prohibit the taking of private property by a state without compensation'; in other words, that the appropriation of private property for public use, without compensation to the owner is not depriving him of his property 'without due process of law.' Counsel for defendant further say that, 'even if due process of law be held to require compensation, the kind of compensation may still be determined by the state, and, in the absence of express constitutional provision to the contrary, the property may be compensated for in special benefits, and it is clearly within the province of the state to provide for estimating this compensation in any manner which involves due process of law,—that is, notice and a hearing.' We need not pause to consider this latter prop-

osition. It is not material to the present case. It suggests a question not here involved, because it clearly appears from the pleadings, exhibits, and agreed statement of facts that no 'special benefits' will inure to complainants from the appropriation of their property, but, on the contrary, that it will result in damage to their remaining property. It would be an anomaly to say that property is specially 'benefitted' by the same act which damages it. A further reason for not discussing this last suggestion of defendant's counsel as to the right of the state to determine the kind of compensation that shall be awarded the owner for property taken for public use, is found in the fact that the action of the common council of Toledo herein called in question, as counsel for defendant admits, is not an attempt to pay for the property to be appropriated by the benefits resulting to other property from the appropriation. If such had been the true character of the proceeding, it would clearly violate the provisions of the state constitution, and, independent of the federal questions involved, would entitle complainants to enjoin its enforcement. The single question is therefore presented, whether, in the taking of private property for public use, 'due process of law' requires that compensation shall be made to the owner for the property so appropriated. In other words, may a state, or any subordinate division thereof, since the adoption of the fourteenth amendment to the constitution of the United States, take the property of its citizen for public purposes without making him compensation therefor? Does 'due process of law,' without which the citizen cannot, under this fourteenth amendment, be deprived of his property by the state, involves as a necessary and essential ingredient the payment or the making of compensation for private property appropriated for public use? This precise question has not yet been passed upon, either by the Supreme Court or the United States or the State courts, so far as we have been able to discover, and it must therefore be considered and determ-

ined upon the general principles applicable to the subject.'

"No attempt will be made to define the exact scope of the terms 'due process of law.' No court has yet succeeded in giving to these words an exact definition applicable to all the varied cases in which they may be involved. The Supreme Court has said (*Davidson vs. New Orleans*, 96 U. S., 104) that, instead of attempting to define what constituted 'due process of law,' it was wiser, in ascertaining the extent and application of such an important phrase in the federal constitution, to adopt the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, and thus, by actual application, give to the words their proper meaning. In a general sense, 'due process of law' is identical in meaning with the phrase, 'law of the land,' as used in the constitution of the several states. Cooley, Const. Lim., 432. As applied to the appropriation of private property for public uses under the power of eminent domain, 'due process of law' clearly does not mean mere legislative enactments, nor simple compliance with the forms of law, nor even constitutional provisions, if they be inconsistent with previously established legal rights. Thus in Cooley Const. Lim. 433, it is said:

"That construction would render the restriction absolutely nugatory, and turn this part of the constitution into mere nonsense."

And again, (at p. 435).

"The principles, then, upon which the process is based, are to determine whether it is due process or not, and not any consideration of mere form. * * * When the government, through its established agencies, inter-

feres with the title to one's property, or with his independent enjoyment of it, and its action is called in question as not in accordance with the law of the land, we are to test its validity by those principles of civil liberty and constitutional protection which have become established in our system of laws, and not generally by rules that pertain to forms of procedure merely. * * * Due process of law, in each particular case, means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."

To the same effect is the language of the supreme court in *Davidson vs. New Orleans*, 96 U. S., 102, where the court, speaking by Mr. Justice Miller, after explaining the reasons why the phrase 'law of the land' as used in *magna charta*, was not directed against the enactments of parliament, proceeds to say:

"But when, in the year of grace 1855, there is placed in the constitution of the United States a declaration that no state shall deprive any person of life, liberty or property without due process of law, can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation. It seems to us that a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A., shall be and is hereby vested in B., would, if effectual, deprive A. of his property without due process of law within the meaning of the constitutional provision."

"In this case of *Davidson vs. New Orleans*, 95 U. S., 107, Mr. Justice Bradley said: "

" If a state, by its laws, should authorize private property to be taken for public use, without compensation,
* * * I think it would be depriving a man of his property without due process of law. * * * I think, therefore, we are entitled under the fourteenth amendment, not only to see that there is some process of law, but due process of law, provided by the state law, when a citizen is deprived of his property; and that, in judging what is due process of law, respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessments for local improvements, or none of these ; and, if found to be suitable or admissible in the special case, it will be adjudged to be due process of law; but if found to be arbitrary, oppressive and unjust, it may be declared to be not due process of law."

" In the *Kentucky Railroad Tax Cases*, 115 U. S. 331, 6 Supt. Ct. Rep. 57, this language of Mr. Justice Bradley is quoted with approval by the Supreme Court. It is a fundamental principle of the common law, established and well settled before the adoption of the federal constitution, that the proper and lawful exercise of the sovereign right of eminent domain involves these two essential elements, viz., that the property must be taken for the public benefit, or for public purposes, and that the owner must be compensated therefor. The exercise of the power of eminent domain is, in legal effect, nothing more than an enforced sale, for the public benefit, at a fair price, to be ascertained in a proper mode, and to be paid the owner for the property so appropriated. This long and firmly established principle hardly requires any discussion or citation of authority in its support. It is thus clearly and forcibly expressed by one of the earliest and ablest law writers:

" So great, moreover, is the regard of the law for pri-

vate property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man or set of men to do this without consent of the owner of the land. * * * In this and similar cases the legislature alone can, and, indeed, frequently does, interpose and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price, and even this is an exertion of power which the legislature indulges with caution, and which nothing but the legislature can perform.' Cooley Bl. bk. 1, p. 137."

"In the same work, (book 2, p. 35, note) on the subject of 'Ways,' it is said: "

"A public way is established either by the dedication of the owner of the land or by an appropriation of the land for the purpose by the sovereign authority, under what is called the right of eminent domain. When this right is exercised, it must be in pursuance of some express legislative authority which prescribes the formalities, and compensation must be made to the owner.'"

"So, too, in Mills, Em. Dom., § 1, it is said on this subject: "

"The annals of all nations enjoying a constitutional government, and of many despotic nations, show that the

moral sense of mankind requires such compensation. In the absence of provisions in the constitution, the courts have considered that the principle was so universal and fundamental that laws not recognizing the right of the subject to compensation would be void."

These well-recognized principles, vital to the security, and essential to the protection, of the citizen against the arbitrary exercise of power on the part of the government, were in full force at the adoption of the constitution of the United States. They were not, however, fully recognized in that instrument as originally adopted. The fifth amendment, providing that private property should not be taken for public use without just compensation, was accordingly required for the better security of private property against the power of government. This amendment to the constitution, which recognized and secured to the citizen, as a fundamental principle, the right to compensation for private property taken for public use, was intended as a limitation to the federal power. The first ten amendments to the constitution recognized and secured to all citizens certain rights, privileges, and immunities essential to their security. The fifth amendment operating only as a limitation upon the power of the general government, fell short of giving to the citizen the full protection to which he was entitled in respect to his life, liberty and property, so far as state action was concerned. It imposed no prohibition or limitation upon the power and authority of the states in dealing with the life, liberty and property of the citizen. They were left to the restraints of their several constitutions and respective laws on these subjects. So far as the states were concerned, citizens of the United States were thus left without adequate protection and security in their persons and property. The fourteenth amendment was adopted to remedy and correct this defect in the supreme organic law of the land. It involves no

forced or unreasonable construction to hold that this fourteenth amendment, as applied to the appropriation of private property for public uses, was clearly intended to place the same limitation upon the power of the states which the fifth amendment had placed upon the authority of the federal government. And as Judge Cooley well remarks:

"Of these amendments it may be safely affirmed that the first ten took from the Union no power it ought ever to have exercised, and that the last three required of the states the surrender of no power which any free government should ever employ."

"Whatever may have been the power of the states on this subject prior to the adoption of the fourteenth amendment to the constitution it seems clear that, since that amendment went into effect, such limitations and restraints have been placed upon their power in dealing with individual rights that the states cannot now lawfully appropriate private property for the public benefit or to public uses without compensation to the owner; and that any attempt so to do, whether done in pursuance of a constitutional provision or legislative enactment, whether done by the legislature itself or under delegated authority by one of the subordinate agencies of the state, and whether done directly, by taking the property of one person and vesting it in another or the public, or indirectly through the forms of law, by appropriating the property and requiring the owner thereof to compensate himself, or to refund to another the compensation to which he is entitled, would be wanting in that due process of law required by said amendment. The conclusion of the court on this question is that since the adoption of the fourteenth amendment compensation for private property taken for public uses constitutes an essential element in due process of law, and that without such compensation the appropriation of private property to public uses, no matter under what form of procedure

it is taken, would violate the provisions of the federal constitution. 'There is no difference in the principle between the case put by Mr. Justice Miller, as an illustration, in *Davidson vs. New Orleans*, 96 U. S., 102, viz., the taking of property from A. and vesting it in B., and the taking of property from an individual and vesting it in the public. 'Due process of law' is equally wanting in both cases; in the latter case, because such a taking, without making compensation to the owner, is nothing short of legalized robbery, or confiscation for the benefit of the public. If, therefore, the statutes of Ohio, whether in harmony with the state constitution or not, authorize the city of Toledo to appropriate the property of complainants for the purpose of a public highway, and to do this in a way which will not only exempt it from duty and obligation of compensating them for the property taken, but imposes upon complainants themselves, under the form of an assessment by the foot front, the burden of compensating themselves or of returning to the city all they may be entitled to receive as compensation for their property, such statutes are wanting in that 'due process of law' required by the federal constitution; and the attempted proceedings had thereunder by the common council of Toledo are void, so far at least, as said assessment is concerned.'

We apprehend, however, that the question whether the taking of private property for public use without compensation is a denial of due process of law is definitely settled by the decision of this court in the case of *Chicago, B. & Q. Co. vs. City of Chicago*, 166 U. S., page 226, where the question receives the most careful and exhaustive treatment. In the fourth sub-division of the syllabus in that case it is said:

"A judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state,

or under its direction for public use, without compensation made or secured to the owner, is wanting in the due process of law required by the fourteenth amendment, and the affirmance of such a judgment by the highest court of the state is a denial by the state of a right secured by the constitution."

In the opinion in this case the leading authorities upon this subject are cited, and nothing further is left to be said.

Having disposed of that part of this case which goes to the jurisdiction of this court on the ground that the taking of private property for public use constitutes a denial of due process of law it only remains to discuss the question whether or not there has actually been such denial in the case at bar, and whether the record in this case shows that the property of the plaintiff in error has been actually taken for public use without compensation.

It was contended by counsel for plaintiff in error in the State court that the Iowa Agricultural Society is a private corporation. If this is true, then we have a case involving the taking of private property for private use, which if possible is more obnoxious to the "law of the land" than the taking for public use. As far as the principle at stake is concerned it matters not which view we take of the status of the Agricultural Society in this respect. *White vs. White*, 5 Barbour, 484, 485. Had the plaintiff in error not executed and delivered an approved supersedeas bond, long before this, doubtless, his sixty lots would have been sold to raise money to apply on the judgment against him for paving assessment. By the stipulation and demurrer it is conceded that said lots, if sold at their fair market value, would not have brought enough to pay the judgment.

This fact then is certain, the plaintiff in error would have been deprived of the entire ownership of his property. Now who did this act of alienation? It cannot be conceived that any one will claim that the plaintiff in error himself did it. The only answer possible to be made is that the plaintiff in error was deprived of his property by force of a contract made and enforced by the city council of the city of Des Moines.

The plaintiff in error has, without any fault or act of his own, been totally divested of his ownership. What compensation has he received? Who will have the hardihood to say that he has received, or in any manner can receive, directly or indirectly, a single farthing? Leaving out of sight that enormity, the personal judgment for a general execution to collect the deficiency, no subtlety of casuistry can cover up the fact that he has received, and will receive no compensation. Having received no compensation for this spoilation of his property, what benefit has the plaintiff in error received? The record does not show that he owns any other real estate in the vicinity of Des Moines, and we think it is a fact that he does not. The only benefit that can possibly be conceived is on the theory that the plaintiff in error is a self-denying philanthropist who receives delight in knowing that the good people of Polk county, Iowa, do not have to drive in the mud for at least one mile on their annual pilgrimages to the State Fair.

If the paving was not a wanton expenditure without use or benefit to any one, it follows that the general public and the State Agricultural Society are the sole beneficiaries. The only constitutional ground for imposing any lien on the lots of the plaintiff in error is totally lacking in this case. I quote from the opinion of Mr. Justice Shepperd, in *City of Raleigh vs. Peace*, 14 S. E., 525, (N. C.):

"We are of the opinion, however, that no personal judgment can be rendered against the abutting owner, and that so much of the amendment to the charter which provides for such a judgment is invalid. It is true that in *Wilmington vs. Yopp*, *supra*, such a judgment was rendered, but the point was not presented and passed upon by this court; the only question decided being the validity of special assessments of this character, and not the manner of their enforcement. We feel at liberty, therefore, to examine into the constitutionality of the act authorizing the judgment in question; and in doing so we cannot better express our views than by quoting the language of Mr. Elliott: 'It is not easy to perceive how the assessment can extend beyond the property against which it is directed, since the sole foundation of the right to direct and enforce the assessment rests upon the theory that the land receives a benefit equal to the assessment. If the land, with the super-added value given to it by the improvement, will not pay the assessment, there is no constitutional warrant for the right to seek payment of the assessment elsewhere, for the land is all that the improvement can by any possibility benefit, and land (or other property) that is not benefitted can not be seized without violating the principle which forbids the taking of property without compensation, nor without breaking down the only theory upon which it is possible to sustain local assessments, and yet if there is a personal liability the assessment may be enforced, although the land, even as enhanced in value by the improvement, may not be worth a tithe of the extent of making the improvement. * * * The decisions which declare statutes imposing a personal liability upon the land-owner unconstitutional are, in our judgment, so strongly entrenched in principle that they cannot be shaken.' Elliott, *Roads and S.*, 400. Such, also is the opinion of Judge Cooley, (*Taxation*, 675,) who says that 'in such a case, if the owner can have his land taken from

him for a supposed benefit to the land which, if the land is sold for the tax, it is thus conclusively shown he has not received, and he is then held liable for a deficiency in the assessment, the injustice—not to say the tyranny—is manifest. But such a case is liable to occur if assessments are made a personal charge; and cases like it in principle, though less extreme in the injury they inflict, are certain to occur.' The foregoing reasons are entirely conclusive to our minds, and are well sustained by authority.

"Higgins vs. Ausmuss, 77 Mo., 351.

Neean vs. Smith, 50 Mo., 525.

Macon vs. Patty, 57 Miss., 378.

Craw vs. Tolono, 96 Ill., 255.

Gaffney vs. Gough, 36 Cal., 104.

Baptish Church vs. McAtee, 8 Bush, 508.

Burlington vs. Quick, 47 Iowa, 226.

Green vs. Ward, 82 Va., 324."

The third assignment of error by the plaintiff in error is as follows, record page 47:

"Third. That the said judgment is not sustained or procured by due process of law, for the reason that the Supreme Court of Iowa, in case of state *ex rel. West vs. City of Des Moines*, 65 N. W. Rep., 818, has formally adjudged and decreed that the act of annexation under and by authority of which said paving tax was assessed is unconstitutional and void, of which judgment this court will take judicial notice, and therefore all acts of the city officers by virtue of said statute are void."

In the case, above mentioned, the Supreme Court of Iowa held that the act under which the boundaries of the city of Des Moines were extended was void, because, although the act was drawn in the guise of a general law,

it was in fact a special law for the reason that the city of Des Moines was the only city in the state of Iowa that possessed the conditions required by the act. If the act was void it seems impossible that the ordinances of the city council of Des Moines extending the boundaries of the city, under the void act, could have any vitality or validity. The stream cannot rise higher than its source. It seems to the writer that if this court will take judicial notice of the above mentioned decision of the Supreme Court of Iowa the record shows that there was neither "due," nor in fact any process of *law* in the proceedings upon which the assessment was founded.

It is true that the Supreme Court of Iowa hold that by laches the state or any individual is estopped from attacking the validity of the subsequent act of corporation, or the validity of indebtedness contracted for improvements made thereunder, but this was grounded on doubtful expediency which is not binding on this court. The decision of the highest court of the state of Iowa holding that the act of the legislature providing for annexation is void, would probably be binding on this court, but the policy of expediency announced by the court to avoid the logical and necessary results of its decision is not binding on this court, nor do we believe it is sustained by either authority or good reason.

Sutro vs. Pettit, 74 Cal., 332.

Were not other questions which seem to be decisive of this case presented by the record, which have been fully discussed, it might be desirable to enter into a more extended discussion of this point, but as the case stands we do not feel justified, nor is it necessary to take up the further time of the court.

Respectfully submitted,

AMASA COBB

ANDREW E. HARVEY

10 132

FILED
DEC 11 1898
DAVIS & DEWEY

Dry. ex Cobb v Harvey for P. C.
Supreme Court of the United States.

OCTOBER TERM, 1898.

Filed Dec. 2, 1898.

No. 100

C. F. DEWEY, PLAINTIFF IN ERROR,

vs.

CITY OF DES MOINES, C. H. DILWORTH, COUNTY
TREASURER OF POLK COUNTY, AND DES MOINES
BRICK MANUFACTURING COMPANY

BRIEF IN BEHALF OF THE PLAINTIFF IN
ERROR.

AMASA COBB,
ANDREW E. HARVEY,
Attorneys for Plaintiff in Error.

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

C. P. DEWEY,
Plaintiff in Error, }
vs.
CITY OF DES MOINES,
C. H. DILWORTH, Coun-
ty Treasurer of Polk Coun-
ty, and DES MOINES
BRICK MANUFACTUR-
ING COMPANY,
Defendants in Error. } No. 395.

IN ERROR TO THE SUPREME COURT OF THE
STATE OF IOWA—BRIEF IN BEHALF OF THE
PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

We follow substantially the plaintiff in error's state-
ment of facts in the supreme court of Iowa.

In the year 1888 C. P. Dewey, the plaintiff in error, who was then and now is a citizen of the state of Illinois, residing in Chicago, became the owner of sixty lots situated in the county of Polk, state of Iowa, and near to but outside the then corporate limits of the city of Des Moines. By provisions of chapter one of the laws of 1890, Record Page 11,) the territory in which these lots

were situated was annexed to the city of Des Moines. (See Record, Page 15.) About one year after said annexation the city council of the city of Des Moines passed certain resolutions providing for the paving and curbing of a street called East Grand Avenue. (Page 2, Record.) Said resolutions were as follows:

"It is hereby declared necessary that East Grand Avenue from Eighteenth street to the State Fair Grounds be improved by paving and curbing."

"That the board of public works be instructed to advertise for bids for curbing and paving East Grand Avenue from Eighteenth street to the State Fair Grounds, the same to be curbed with artificial stone and paved with brick."

The lots belonging to plaintiff about directly upon the said East Grand Avenue thus ordered to be paved, he having thirty situated upon the north side of the said street and thirty lots situated upon the south side of the said street, each lot having a frontage of forty feet and an average depth of one hundred thirty-seven and one-half feet. March 15, 1892, the said council of the city of Des Moines entered into a contract for the paving and curbing of the said street, (Record Page 16) and the work was actually done. When the work was completed there was assessed against each of said lots the sum of \$148.80, the cost of paving alone, and against the entire sixty lots the sum of \$8,928.00, which sum with ten per cent interest added amounted at the time of the decree to be here-

inafter mentioned to the sum of \$11,655.50. By the terms of the certificates which were issued to the contractors the sum specified, that is to say \$148.80 for each lot, was assessed against the lots and also against the plaintiff in error, the owner, as a personal debt. On the 30th day of April, 1894, the plaintiff in error began a suit in equity in the district court of Polk county, Iowa, having for its object the setting aside of said special assessment for paving. The certificates which had been issued to the contractors for doing the work had been assigned to the Des Moines Brick Manufacturing Company, one of the defendants in said suit. Said brick company filed a counter-claim against the plaintiff in error, and the lots in question, to foreclose the certificates. (Record, Pages 18-23.) As will be shown later, the allegations in the plaintiff's bill were by demurrer and stipulation admitted to be true. We cannot better describe the exact grievance of the plaintiff in error in his suit than by quoting in full paragraph six of his bill in the district court, which is as follows:—(Record, Pages 3, 4, 6.)

"That the resolution to have said street and the order directing said work to be done were oppressive, collusive, fraudulent and void. That in the year 1886 the highway now called East Grand Avenue was laid out and opened under the order and directions of the board of supervisors of Polk county, Iowa. That said highway was laid out and opened one hundred feet wide and was at that time in a fair condition for public travel. That said highway between the points designated in the resolution of

the city council as Eighteenth street on the west and the fair grounds on the east was worked and improved between 1886 and April, 1890, so that it became a first-class country road and was traversed largely by vehicles passing from the city to the State Fair Grounds and returning, during the four years last mentioned. That in 1886 the fair grounds of the State Agricultural Society of Iowa were established about one mile east of the eastern limits of the city of Des Moines as then established, and that said highway now known as East Grand Avenue was thereafter largely used and traveled in reaching said fair grounds and there was no complaint or objection to such roadway, except that it was somewhat dusty in dry weather.

"That in the year 1890, when the attempt was made to extend the eastern limits of the city of Des Moines two and one-half miles farther to the east, as hereinafter set out, the directors of the State Agricultural Society solicited the city council of Des Moines to cause East Grand Avenue to be curbed and paved from Eighteenth street, being near the eastern limit of said city before such annexation, eastward to the State Fair Grounds, the reason assigned being the great benefit which would accrue to said State Agricultural Society in holding its annual State fair. That there was no real necessity for paving or curbing said street between Eighteenth street and the State Fair Grounds, so far as the property or interests of persons residing or owning property along said street were concerned. That the distance between the points just mentioned is something over one mile, but in that entire distance

and on both sides of said street there are now only four small and inexpensive houses, and some of them were not built when the street was ordered improved in 1891. That along said street on both sides, between the points just mentioned, there are no stores, shops, factories or buildings of any description whatever, except only the four small dwelling houses just mentioned; and the owners of said four improved lots were opposed to the paving of the street. That all the property owners on both sides of said street, between Eighteenth street and the State Fair Grounds, were opposed to the paving and curbing of said street at the expense of abutting property,, and many of said owners protested to the city authorities against such improvement; but that said city council at the solicitation and sole instance, and for the benefit alone of the State Agricultural Society and its directors, *when there was no actual necessity or real occasion therefore otherwise*, passed said resolutions of necessity and ordered said work to be done, and approved and accepted said work, and levied said tax, and is now seeking to enforce the same against the property of the plaintiff and of others abutting upon said street. And plaintiff alleges that the State Agricultural Society, a private corporation under the laws of Iowa, holds a fair on its grounds lying immediately east of Twenty-eighth street in such alleged' extended limits of said city, on or about the first week of September in each year; that large numbers of people visit such fair each year from all sections of the state, and that East Grand Avenue is and has been the most direct and convenient highway to said fair grounds for wagons, horses and cattle and persons having them in

charge. That under the circumstances aforesaid, and at the solicitation of the directors of said State Agricultural Society, the said city council, desiring to aid said Agricultural Society, and well knowing that the paving of said highway was unnecessary except alone for the porpose aforesaid, and well knowing that such paving would be of no benefit to the owners of abutting property and was unnecessary for any city use or purpose, or for the use or purpose of the people living along said street or living in any other portion of the city, and also well knowing that the cost of the paving alone (which was ordered to be paved forty-two feet in width along said street), aside from the cost of curbing and sidewalks, would largely exceed the market value of abutting lots one hundred and fifty feet in depth; knowing all these matters, nevertheless, the said city council, fraudulently and collusively and oppressively, and to the great oppression and wrong of plaintiff and other owners of abutting property along said street, ordered the same to be curbed and paved as aforesaid and caused said work to be done, and assessed the entire cost thereof against the owners of abutting property."

The plaintiff in error had no actual notice or knowledge of the resolution of the city council to pave said street, or said improvement until after the completion and acceptance of the work, nor did he have any such notice or knowledge until he applied to the county treasurer of Polk county for a statement of the general taxes upon his said property in the month of March, 1894. In the bill of plaintiff in error there is the further allegation in paragraph six:

"That the amount of said tax is greater than the reasonable market value of said lots, whether considered singly or together; the assessment against each particular lot being greater in amount than the value of such particular lot, and the aggregate assessment being greater in amount than the reasonable market value of all of said lots taken together; and that said defendants are seeking to enforce as against plaintiff not merely a sale of said lots, but also to compel plaintiff to pay the full amount of said tax regardless of whatever sum said lots may be sold for, and regardless of the actual value of the same."

As before stated the Brick Company filed an answer and counter claim being based upon the above certificates issued to the contractors in payment for the work. There was no denial in the answer of the matters alleged in the petition which are now relied upon and the averments of the counter-claim were controverted by the reply filed by plaintiff in which the matters pleaded in the petition are in substance repeated as the defense thereto. The Brick Company then filed a motion to strike out as presenting no cause of action in favor of the plaintiff, nor in defense against its counter-claim. (Record, Pages 26, 27, 28, 29). By the stipulation filed in the case it was agreed that the motion to strike should be given the same effect as a demurrer to the paragraphs and portions of paragraphs assailed by said motion as amended and qualified by the stipulation. The motion to strike which was sustained by the court struck out every material allegation in the petition and reply, conceding them to be true in

fact, but adjudging each and all of them to be insufficient in law to afford plaintiff any relief ~~as against~~ the assessment in question. The defendants, the city of Des Moines and C. H. Dilworth, treasurer, demurred to the bill on the general equitable ground that the facts stated therein did not entitle plaintiff to the relief demanded, or to any relief whatever, and the demurrer was sustained.

It is of no consequence whether the case is presented upon the general demurrer to the petition filed by the city of Des Moines and treasurer, or upon the motion to strike filed by the Brick Company. By the terms of said stipulation (Record, Pages 29, 30), the plaintiff's bill and his reply to the counter-claim of the Brick Company were so modified as to eliminate therefrom the allegations as to actual fraud and collusion, and to substitute an allegation of fraud in law instead of an allegation of fraud in fact. In other words that the said authorities and the contractors knew of the facts stated in the pleadings on behalf of plaintiff, and ordered the contract and improvement solely to facilitate travel along East Grand Avenue to the State Fair Grounds, but they had no fraudulent intention in fact in ordering the paving of the street or in doing the work under the circumstances above stated. Upon the trial of the case in the district court no evidence was adduced except the introduction and filing of the certificates sued upon under the cross-petition, and the case was submitted to the court upon the pleadings and stipulation above mentioned. The court gave to the Brick Company a decree on November 18, 1895, against the plaintiff in error for \$11,655.50 and the petition of the

plaintiff in error was dismissed on the merits as to the other defendants. (Record, Pages 30-32). By the provisions of the decree the plaintiff in error is made personally liable for the payment of the total assessment, regardless of the value of the property, the provisions upon subject in the decree being as follows:

"It is therefore considered, adjudged and decreed that defendant, Des Moines Brick Manufacturing Company, have and recover from the plaintiff, C. P. Dewey, the sum of \$11,655.50, with interest thereon from the 18th day of November, 1895, (being amount of said special assessments with interest from the date of the assessment at the rate of ten per cent per annum and a collection fee equal to five per cent of said assessment and interest), and in addition thereto the costs of this action as taxed by the clerk."

After providing for a sale of the lots to satisfy the aforesaid judgment, the decree then proceeds:

"It is further ordered and adjudged that for balance of said judgment, interest or costs remaining unsatisfied after return of said special execution, a general execution shall issue against the plaintiff."

The plaintiff in error appealed to the Supreme Court of the state of Iowa, and among others, made the following assignment of error: (Record, Page 33).

"The court erred in holding and deciding that plaintiff was personally liable to said Des Moines Brick Manu-

facturing Company for so much of said special tax or assessment as could not or would not be realized by a sale of the sixty lots in question on special execution, and in ordering and adjudging that a general execution should issue against plaintiff and in favor of said Des Moines Brick Manufacturing Company for the balance of such tax or assessment; and further that, as plaintiff was at all times a non-resident of the state of Iowa and had no personal notice or knowledge of the assessment proceedings, that the imposition of a personal liability against him, in excess of the value of all the lots, was not due process of law and was in contravention of the provisions on that subject of the fourteenth amendment to the constitution of the United States, as well as in contravention of the provisions of the constitution of the state of Iowa on the same subject."

Upon the hearing in the said Supreme Court the decree and judgment of the District Court of Polk county was in all things confirmed, whereupon the plaintiff in error brings his cause to this court for relief, and says that the said Supreme Court of the state of Iowa erred in affirming the said decree and judgment of the said district court of Polk county, as set forth in the following assignments of error:

67 In the Supreme Court of the United States, October Term, 1897.

C. P. DEWEY, Plaintiff in Error,
 v.
 CITY OF DES MOINES, C. H. DILWORTH,
 Treasurer of Polk County, Iowa, and
 Des Moines Brick Manufacturing Com-
 pany, Defendants in Error.

} Error to Su-
 preme Court
 of Iowa.

Assignments of Error.

The above plaintiff in error makes the following assignments of error as grounds for review of a certain final judgment in the supreme court of Iowa in the above entitled cause, made and entered at the October, 1896, term of said court, to-wit, on the 7th day of April, 1897, the said court being the highest court of said State of Iowa and the highest and last court of said state to which said cause could be carried by said plaintiff in error.

It appears from the record in said cause, and especially from the pleadings, stipulations, and findings of the trial court therein, that the plaintiff in error is and at all times since the pendency of the proceedings complained of has been a citizen and resident of the city of Chicago, State of Illinois.

That he was and is the owner in fee simple of sixty lots in a certain subdivision called "Central Park," said lots being numbered consecutively from (17) seventeen to (76) seventy-six, inclusive; that said Central Park was surveyed and platted into lots, and said plat filed in the office of the county auditor of Polk county, Iowa, (the county 68 in which said lots are situated), in the year 1886; that when said Central Park was platted and divid-

ed into lots, said lots were situated outside the corporate limits of the city of Des Moines; that by the provisions of chapter one, Acts 23 G. A. of Iowa, 1890, it was claimed that Central park and other territory in the neighborhood, being two and one-half miles eastward of the former boundary of said city, were annexed to and became a part of the city of Des Moines, but the plaintiff in error has at all times maintained that said alleged annexation was illegal and void.

It further appears that in the month of May, 1891, the city council of Des Moines declared that it was necessary to pave and curb East Grand avenue and proceeded by contract to pave and curb East Grand avenue from 18th street to the State fair grounds, that the lots belonging to the plaintiff in error lie abutting to said East Grand avenue; that as his share of the cost of said paving and curbing there was assessed against the said lots of the plaintiff in error the aggregate sum of \$8,928.00, which was made a lien on said lots; that the plaintiff in error has always refused to pay said assessment, claiming the same to be illegal and void, and on April 30th, 1894, brought a suit in equity in the district court of Polk county to set aside said special assessment for paving and curbing.

Judgment was rendered against the plaintiff in error in the district court, and upon appeal to the supreme court of Iowa the final judgment of said district court was in all things ratified and confirmed by the supreme court of Iowa and became and is in effect the final judgment of said last named court.

It appears by stipulation and demurrer that the defendants in error admitted the following facts:

First. That the plaintiff in error had no actual notice or knowledge of the action of the city council aforesaid until he applied, in 1894, to the county treasurer
69 of Polk county for a statement of his general taxes on said lots, and no constructive knowledge except such as might be offered by publications in newspapers in the city of Des Moines.

Second. That the amount of said taxes for paving and curbing is greater than the reasonable market value of said lots, whether considered singly or otherwise, the assessment against each particular lot being greater in amount than the value of said lot and the aggregate assessment being greater in amount than the reasonable market value of all of said lots taken together.

Third. That at the time of the making of such assessment the city council of Des Moines well knew that the costs of paving and curbing said street would exceed the market value of the abutting lots owned by the plaintiff in error and others.

Fourth. That the defendants in error are seeking to enforce against the plaintiff in error not merely a sale of said lots, but also to compel him to pay the full amount of said tax, regardless of whateversum said lots may be sold for and regardless of their actual value.

Fifth. That said paving and curbing *was* ordered

solely on account of the supposed benefit which would accrue to the State Agricultural Society in holding its annual State fair.

Sixth. That there was no actual necessity for paving or curbing said street, so far as the property or interests of persons residing or owning property along said street was concerned.

Seventh. That for more than a mile on said street on that part on which plaintiff's lots abut, there are only four small and cheap houses, and some of them were not built when the paving and curbing was ordered.

Eighth. That along said street, in the space mentioned, there are no stores, shops, factories, or buildings of an description whatever except the four houses mentioned.

80 Ninth. That all the property-holders on both sides of the street between 18th street and the State fair grounds, a distance of more than a mile, were opposed to the paving and curbing of said street at the expense of the abutting property.

Tenth. That said city council, at the solicitation and sole instance and for the benefit alone of the State Agricultural Society and its directors, when there was no actual necessity or real occasion therefor otherwise, passed said resolutions declaring the existence of a necessity for —, and ordered said paving to be done, and approved and accepted said work, and levied said tax, and is now seek-

ing to enforce the same against the property of the plaintiff in error and of others abutting on said street.

The district court of Polk county, Iowa, by its judgment sustained the validity of said tax and rendered a personal judgment against the plaintiff in error for the sum of \$11,655.50, with interest from November 18, 1895, and decreed that for any balance of said judgment remaining unsatisfied after the sale of said sixty lots a general execution shall issue against the plaintiff in error. This judgment and decree was in all respects confirmed by the judgment of the supreme court of Iowa.

In such judgment and decree there is manifest error, in this, to-wit:

First. The levy and enforcement by lien of said paving tax for the sole benefit of the public, upon the property of the plaintiff in error to an amount equal to or exceeding the value of the same is a taking of private property for public use without just compensation, in violation of the fifth amendment of the Constitution of the United States and section 18, article one, of the Constitution of the State of Iowa.

Second. That the imposition of a personal liability
71 against the plaintiff in error for any amount of said
tax unsatisfied after the sale of the said lots is not
not due process of law, and is in violation of the four-
teenth amendment of the Constitution of the United
States.

Third. That the said judgment is not sustained or

procured by due process of law, for the reason that the supreme court of Iowa, in the case of State ex rel. West v. City of Des Moines, 65 N. W. Rep., 818, has formally adjudged and decreed that the act of annexation under and by authority of which said paving tax was assessed is unconstitutional and void, of which judgment this court will take judicial notice, and therefore all acts of the city officers by virtue of said statute are void.

Wherefore said plaintiff in error respectfully prays that the said judgment of the supreme court of Iowa against him may be reversed, modified, vacated, or set aside, as may appear to be required by law.

ANDREW E. HARVEY,

Solicitor for plaintiff in Error.

ARGUMENT.

In our argument in this brief in support of our prayer for a reversal of the judgment of the Iowa courts, we will rely upon the following specifications of error:

FIRST: UNDER THE FACTS SHOWN BY THE RECORD, THE ASSESSMENT OF THE ENTIRE COST OF PAVING EAST GRAND AVENUE UPON THE ABUTTING PROPERTY OF THE PLAINTIFF AND OTHERS, AMOUNTS TO THE TAKING OF PRIVATE PROPERTY FOR PUBLIC USE WITHOUT COMPENSATION, AND IS THEREFORE A DENIAL OF THAT "DUE PROCESS OF LAW" WHICH IS GUARANTEED BY THE

FOURTEENTH AMENDMENT TO THE
CONSTITUTION OF THE UNITED STATES.

SECOND: THAT THIS RENDITION OF A PERSONAL JUDGMENT AGAINST THE PLAINTIFF IN ERROR FOR ANY AMOUNT OF SAID ASSESSMENT THAT SHALL REMAIN UNSATISFIED, AFTER THE SALE OF SAID LOTS AND THE APPLICATION OF THE PROCEEDS TO THE PAYMENT OF THE SAME, IS A DENIAL OF DUE PROCESS OF LAW, AND IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

cc

THIRD: THAT SAID JUDGMENT AGAINST THE PLAINTIFF IN ERROR WAS RENDERED IN VIOLATION OF LAW FOR THE REASON THAT THE SUPREME COURT OF IOWA IN A CASE HEARD AND DECIDED BY IT ENTITLED STATE EX REL. V. CITY OF DES MOINES, REPORTED IN 65 N. W. REP. 818, HAD FORMALLY ADJUDGED AND DECREED THAT THE ACT OF ANNEXATION UNDER AND BY AUTHORITY OF

WHICH SAID PAVING TAX WAS ASSESSED IS UNCONSTITUTIONAL AND VOID AND THEREFORE ALL ACTS AND ORDINANCES OF THE CITY OFFICERS OF THE CITY OF DES MOINES BY VIRTUE OF SUCH STATUE ARE VOID.

Before entering into the discussion of the above propositions we will briefly recapitulate the most salient facts shown by the record. It is admitted by the pleadings together with the stipulation that the assessment was made at the special instigation of the said State Agricultural Society of Iowa.

That there was no particular need of said paving for general public purposes.

That to increase the comfort and convenience of citizens desiring to attend the State Fair each year said paving was ordered and the costs thereof assessed entirely upon the abutting property.

That none of the owners of said abutting property desired said improvements, but on the contrary many of them having knowledge of the improvement in contemplation protested strongly against it.

That for more than a mile of said street on that part of it on which plaintiff's lots abut there are only four small and cheap houses, and some of them were not built when the paving and curbing was ordered.

That the said council of the city of Des Moines, at the time said work was ordered, well knew that the cost of said work would exceed the value of the property upon which the brunt of paying for said improvements was placed.

That said paving and curbing was ordered solely on account of the supposed benefit which would accrue to the State Agricultural Society in holding its annual State Fair.

That there was no actual necessity for paving or curbing said street so far as the property or interests of persons residing or owning property along said street was concerned.

That by the judgment of the District Court, which was in all things affirmed by the Supreme Court of Iowa, the cost of paving and curbing the street fronting upon the lots belonging to plaintiff in error was made a personal judgment against him, thus appropriating the entire property and providing for a general execution against plaintiff in error to recover whatever deficiency there should be after selling his lots.

The counsel for plaintiff in error in the State Court seems to have relied upon one single proposition only as involving a federal question; to-wit: "As plaintiff was at all times a non-resident of the state of Iowa, and had no personal notice or knowledge of the assessment proceedings, that the imposition of the personal liability against him in excess of the value of all the lots was not due process of law and was in contravention to the provisions on that subject of the fourteenth amendment to the Constitution of the United States.

The writer can discover no reason for thus limiting and narrowing down this constitutional question to the

mere fact that the plaintiff in error was a non-resident of the state of Iowa, and had no personal notice or knowledge of the assessment proceedings, and that the imposition of the personal liability against him *in excess of the value of all the lots* was not due process of law. While the fact that the plaintiff in error did not actually have notice of the contemplated imposition of an assessment lien upon the property; may be, and doubtless is, of some importance, still in the writer's opinion it is but a minor issue. It is in fact of small importance for the purposes of this discussion whether the plaintiff in error was a citizen of Iowa or Illinois, whether he had, or did not have, notice of the pendency of the assessment proceedings. The mere fact that the city council has made an assessment upon his property which it knew at the time of the making of the same, exceeded in cost the fair market value of the property to be assessed was a violation of the fourteenth amendment to the Constitution of the United States. While it may be that this court would not inquire into the proportion or extent to which property has been benefitted by local improvement, and will not interfere when the sole question is to what extent the abutting property had been benefitted, I think it ought, and will, declare that an assessment for local improvements equal to or exceeding the actual value of the property assessed is a gross violation of the very principle upon which all assessments are based, to-wit, the increased value caused thereby to the abutting property, and that it constitutes the taking of private property for public use without compensation.

In DILLON ON MUNICIPAL CORPORATIONS,

third edition, section 761, will be found the following statement of the law:

"Special benefits to the property assessed, that is benefits received by it in addition to those received by the community at large, is the true and only just foundation upon which local assessments can rest, and to the extent of special benefits it is everywhere admitted that the legislature may authorize local taxes or assessments to be made. Local improvements can be assessed upon particular property only to the extent that it is specially and peculiarly benefitted, and since the excess beyond that is a benefit to the municipality at large, it must be born by the general treasury."

To the same effect is the ruling of Mr. Justice Sharwood in *Hammett v. Philadelphia*, 665 Pa., R. 146:

"Local assessments can only be constitutional when imposed to pay for local improvements clearly conferring special benefits upon the property assessee, and to the extent of these benefits: they cannot be imposed when the improvement is either expressed or appears to be for the general benefit."

We would not go to the extent of claiming that an assessment which nearly equals the value of the property assessed, and which exceeds the benefits conferred upon the abutting property would necessarily furnish a case for the interposition of this court upon the ground that there had been a denial of due process of law, however obnox-

ious such an assessment would be to general principles of law, but when it is admitted, as in this case, that the imposition of the assessment amounts to the confiscation of the entire property which the plaintiff in error has in the abutting lots, it is clearly taking of private property for public use without compensation and therefore a denial of due process of law, and a case deserving of relief from this court.

We cite authorities sustaining the doctrines laid down in Dillon's Municipal Corporations, as follows:

City of Raleigh v. Peace, 14 S. E., 521.

Cain v. Commissioners, 71 N. C.

Cooley's Constitutional Limitations, Sec. 506.

1st *Hare American Constitutional Law*, 286 to 315.

Elliott on Roads and Streets, 369; 370 and 371.

Higgins v. Ausmuss, 89 Mo., 3518

Neenan v. Smith, 60 Mo., 525.

Macon v. Patty, 57, Miss., 378.

Craw v. Tolons, 96 Ill., 255.

Gaffney v. Gaugh, 36 Cal., 104.

Baptist Church v. McAlee, 8 Bush., 508.

Burlington v. Quick, 47 Iowa, 226.

Green v. Ward, 82 Va., 324.

Louisiana v. Miller, 66 Mo., 457.

Virginia v. Hall, 96 Ill., 278.

Taylor v. Palmer, 81 Cal., 240.

Seattle v. Yerter, 1 Wash. Ter., 576.

Thomas v. Gains, 35 Mich., 156.

Crawford v. People, 82 Ill., 557.

Waterpower Company v. Green Bay, etc., 142 U. S., 254.

One of the most valuable cases containing a learned and most satisfactory discussion of this question, is the *Tidewater Co. v. Caster*, 18 N. J. Equity reports 518. (3 C. E. Greene 526). We quote from the opinion of the court commencing on page 527, which after describing the nature of a statute to provide for the drainage of meadow lands says:

"But looking more closely into the structure and effect of this statute there appears to be a defect which seems to be both radical and incurable and which must prevent its judicial enforcement. The defect alluded to is this: No provision is made for the indemnification of the owner of the land subjected to the operation of this law, in case the expense of the improvement shall exceed the benefits which shall be conferred. The act authorizes the entire expense of drainage to be imposed upon the lands, whether such expense falls below, or rises above, the increase in value which may accrue to the lands by reason of such drainage. In other words, the cost of the enterprise is to be imposed as a burden on the lands, even though a full equivalent in the way of improvement shall not be given to the land owner. Thus if the cost of drainage shall be

\$5.00 an acre, such sum is to be assessed on the land, although such land may not be benefitted more than to the extent of \$3.00 an acre. The statute does not require that the apportionment of expense shall be limited, as the maximum rate, by the increase in the value to result from the improved condition of the land. Now, therefore, it seems to me obvious, that if this scheme be carried into effect, in the event of an excess of expenses over benefits, private property, *pro tanto*, will be taken for public use without compensation. Where lands are improved by legislative action, on the ground of public utility, the cost of such improvement, it has been frequently held, may, to a certain degree be imposed on the parties who, in consequence of owning lands in the vicinity of such improvement, receive a peculiar advantage. By the operation of such a system, it is not considered that the property of the individual, or any part of it, is taken from him for the public use, because he is compensated in the enhanced value of such property. But it is clear this principle is only applicable when the benefit is commensurate to the burthen; when that which is received by the land owner is equal or superior in value to the sum exacted, for if the sum exacted be in excess, then to that extent, most incontestably, private property is assumed by the public. Nor, as to this excess, can it be successfully maintained that such imposition is legitimate as an exercise of the power of taxation. Such an imposition has none of the essential characteristics of a tax. We are to bear in mind that this projected improvement is to be regarded as one in which the public has an interest; the

owners of these waste lands have a special concern in such improvements, so far as their lands will be in a peculiar manner benefitted; beyond this, their situation is the same as that of the rest of the community. The consideration for the excess of the cost of the improvement over the enhancement of the property, within the operation of this act, is the public benefit; how, then, upon any principle of taxation, can this portion of the expense be thrown exclusively upon certain individuals? The expenditure of this portion of the cost of the work can only be justified on the ground of benefit to the public. I am aware of no principle which will permit the expenses incurred in conferring such benefit upon the public, to be laid in the form of a tax upon certain persons, who are designated, not indeed by name, but by their description as the owner of certain lands. A legislative act, authorizing the building of a public bridge, and directing the expenses to be assessed on A, B and C, such persons not being in any way benefitted by such structure, would not be an act of taxation, but a condemnation of so much of the money of the persons designated, to a public use. And, precisely in the same way, would an exaction of the cost of these works embraced in the act before us, so far as such cost exceeded the benefit to the lands improved, be an assumption of the money of a few individuals for an end purely public. Nor should it be overlooked, that if the scheme embraced in this act should be put in operation, and the expenses should exceed or equal the value of the land in its reclaimed condition, the inevitable result would be, that the public would acquire the benefits contemplated by the

rescue of the land from its present idleness, but the owner of the land would lose his entire property. Every consideration of equity stands opposed to the admission of such a rule of taxation. Nor do I consider it any answer to this last objection to suggest that there is no probability that the expenses of this improvement will equal the improved value of the land to be affected by it. It is clear that the cost of the work and the value of the land in its altered condition are not easy of estimation. It is certain that many enterprises of a similar character have proved abortive, and have brought great losses upon their projectors, and it is enough therefore to say that the property owner cannot without his consent be made a party in the hazards of such an enterprise. If the assessment to which he is subjected had been restricted so as not to exceed the benefits received by him, he would have run no risk because he could not have suffered any loss. But as this law is framed his land may be taken from him if the expenses of the project require the sacrifice. This, as has been already stated would be in my opinion equivalent to a condemnation of the land without compensation for the public benefit, and as this may result from the natural operations of the statute, I am compelled to conclude that it is unconstitutional and void. Thus far this subject has been treated on general principles and the deduction which has been drawn rests on those ordinary rules of justice which, to a considerable degree, form the basis of the social compact. But the result in this way attained has, it is conceived, the great weight of authority in its favor. In the matter of Canal Street, 11 Wendell, 154.

Chief Justice Savage, referring to a proceeding to open a street in the City of New York, says: 'If this assessment is confirmed and enforced, the owners of the adjacent property must pay beyond the enhanced value of their property, and all such excess is *private property taken for public use without just compensation!*'"

"The following adjudications are also in point in support of the doctrines that in proceedings to effect public improvements, the assessment of expenses on the property in the locality of such improvement, must not exceed the value of the benefit conferred upon the land owner.

"Matter of Fourth Avenue, 3 Wend, 452.

"Matter of Albany Street, 11 Wend, 149.

"Matter of Williams and Anthony Street, 19
Wend, 678.

"Matter of Flatbush Ave., 1 Barb. S. C. R., 286.

"Nichols v. City of Bridgeport, 23 Conn., 204.

"It is scarcely necessary to add that if a statute is void which does not provide against the chance that the benefits conferred by the projected improvements may be less than the burden imposed on abutting property owners, an ordinance which provides for improvements, in the face of the admitted fact that the cost of the same will exceed not only the benefits conferred, but the entire value of the abutting property, must certainly be void.

"The latest utterance of this court, touching on this

point, is in *Holden v. Hardy*, 18 Supreme Court Reporter, 383. We quote the first paragraph of the syllabus:

"Due process of law" implies at least a conformity with natural and inherent principles of justice, and forbids that one man's property or right to property, shall be taken for the benefit of another, or for the benefit of the state, without compensation, and that no one shall be condemned in his person or property without an opportunity of being heard in his own defense.'

But this amazing decree of the Iowa court is not satisfied, and does not stop, with the appropriation and virtual confiscation of all of the plaintiff in error's interest in said lots, and notwithstanding the fact that the record shows that the lots were not sufficient in value to pay for the cost of the improvement, the court orders the sale of the lots, judicially knowing that the proceeds would fall far short of paying in full the cost of assessment made against said lots, and decreed that after the application of the proceeds of said lots a general execution should run against the property of the defendant wherever found in the jurisdiction of the said courts of Iowa which carried with it the right to sue upon said judgment in the courts of Illinois, where the plaintiff in error resides, or in any other state where he has property, and having obtained a judgment thereupon to levy upon any property of the plaintiff in error which might be situated therein.

A perusal of the opinion of the Supreme Court of Iowa

shows that that court, while not attempting to evade the force of these facts, not denying the resulting hardships, contends that this taking of the property of the plaintiff in error does not amount to denial of due process of law, and holds that he is without remedy. It is clear that said court relies upon the case of Davidson v. New Orleans, 96 U. S. 97, to sustain its position.

It must be admitted that certain portions of the opinion of Mr. Justice Miller in this case seem to justify the interpretation placed upon it by the Supreme Court of Iowa, and had not this court in a later decision unmistakably expressed a contrary doctrine, we would feel that our only hope for success in this case would rest upon the presumptuous expectation of obtaining a reversal by this court of its decision in Davidson v. New Orleans. I will quote briefly the two paragraphs mentioned. On page 105, 96 U. S., the opinion says:

"If private property be taken for public uses without just compensation, it must be remembered that, when the fourteenth amendment was adopted, the provision on that subject, in immediate juxtaposition in the fifth amendment with the one we are construing, was left out, and this was taken. It may possibly violate some of those principles of general constitutional law, of which we could take jurisdiction if we were sitting in review of a Circuit Court of the United States, as we were in Loan Association v. Topeka (20 Wall. 655). But however this may be, or under whatever other clause of the Federal Constitution we may review the case, it is not possible to hold that a

party has, without due process of law, been deprived of his property, when as regards the issues affecting it, he has, by the laws of the state, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case."

And on page 106 the opinion says:

"And lastly, and most strongly, it is urged that the court rendered a personal judgment against the owner for the amount of the tax, while it also made it a charge upon the land. It is urged with force, and some highly respectable authorities are cited to support the proposition, that while for such improvements as this a part, or even the whole, of a man's property connected with the improvement may be taken, no personal liability can be imposed on him in regard to it. If this were a proposition coming before us sitting in a state court, or, perhaps, in a circuit court of the United States, we might be called upon to decide it; but we are unable to see that any of the provisions of the Federal Constitution authorizes us to reverse the judgment of a State Court on that question. *It is not one which is involved in the phrase, 'due process of law,'* and none other is called to our attention in the present case."

We have studied these paragraphs very carefully, and we can extract from them no other suggestion except that the distinguished jurist said that, because that provision in the fifth amendment of the Constitution of the United States forbidding the taking of private property

for public use without compensation was omitted from the fourteenth amendment, therefore such a prohibition was not operative upon the several states, and second, that the taking of private property for public use without compensation is not a denial of true process of law, and therefore in such a case there was nothing in the record raising a federal question. In view of the great mass of respectable authorities to the contrary on this question we cannot but think that the language quoted was inadvertently used and was not intended to express the views which its plain import would convey. Indeed, it would seem that Mr. Justice Bradley in his concurring opinion does not give the construction to the language of Mr. Justice Miller that is given to it by the Supreme Court of Iowa, and which we admit may fairly be given, for he says on page 107, 96 U. S.:

"It seems to me that private property may be taken by a state without due process of law in other ways than by mere direct enactment, or the want of a judicial proceeding. If a state, by its laws, should authorize private property to be taken for public use without compensation except to prevent its falling into the hands of an enemy, or to prevent the spread of a conflagration, or, in virtue of some other imminent necessity, where the property itself is the cause of the public detriment), I think it would be depriving a man of his property without due process of law. The exceptions notcdimply that the nature and cause of the taking are proper to be considered. The distress warrant issued in the case of Murray's Lessee et

al. v. Hoboken Land and Improvement Co. (18 How. 272) was sustained, because it was in consonance with the usage of the English government and our state governments in collecting balances due from public accountants, and hence was 'due process of law.' But the court in that case expressly holds that 'it is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative, as well as on the executive and judicial power, of the government, and cannot be so construed as to leave congress free to make any process, due process of law, by its mere will, p. 276. We think, therefore, we are entitled under the fourteenth amendment, not only to see that there is some process of law, but 'due process of law' provided by the state law, when a citizen is deprived of his property; and that in judging what is 'due process of law,' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these, and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law;' but if found to be arbitrary, oppressive and unjust, it may be declared to be not 'due process of law.' Such an examination may be made without interfering with that large discretion which every legislative power has of making wide modifications in the forms of procedure in each case, according to the laws, habits, customs, and preferences of the people of the particular state may require.

In this language by Mr. Justice Bradley is contained "all of the law and the prophets."

In the case of Scott v City of Toledo, 36 Fed, Rep., 385, Mr. Justice Jackson, in his admirable and exhaustive discussion of the question we are now considering, did not construe the language of Mr. Justice Miller as conveying the meaning which the Supreme Court of Iowa and the writer has placed upon the excerpts which we have quoted from Mr. Justice Miller's opinion. Mr. Elliott, in his work on Roads and Streets, however, adopts the construction which the Supreme Court of Iowa has adopted, and says in so many words that Mr. Justice Miller has held that the taking of private property for public use without compensation does not constitute a denial of due process of law.

It is not profitable to pursue this branch of the subject any further, in view of the later decisions of this court, our only excuse for having occupied so much space upon it is to show that the Supreme Court of Iowa evidently denied relief to the plaintiff in error because of the construction it gave to the above quoted language of Mr. Justice Miller. Upon the general question under discussion, we beg leave to call the court's attention to the above mentioned case of Scott v. City of Toledo, 36 Fed. Rep., 385. For the convenience of the court we will quote liberally from the excellent opinion in that case where all the authorities that we would otherwise quote ourselves are carefully and effectively marshalled by Mr. Justice Jackson. Commencing on page 391 he says:

"Counsel for complainants, on this branch of the case, submit for consideration, upon the facts, two leading and general questions of law:

- "(1) May municipal corporation appropriate private property for the purposes of a public highway, and compel the owner thereof to repay to the corporation, by an assessment upon his remaining property, not only the entire amount which it has paid him for the property appropriated, but also the costs and expense of ascertaining that amount, and the damages resulting to such remaining property from the taking of the property approriated?
- (2) May private property be appropriated for public uses, and a charge levied to pay therefor, without affording the person whose property is to be charged a time, place, or tribunal where he may be heard, before the liability for such charge is finally established, and the amount thereof definitely fixed?"

"Upon the first proposition it is insisted on behalf of complainants that compensation for private property taken for public uses is an essential element of that 'due process of law' without which the citizen cannot be lawfully deprived of his property. For the defendant it is claimed that 'the fourteenth amendment does not prohibit the taking of private property by a state without compensation;' in other words, that the appropriation of private property for public use, without compensation to the owner is not depriving him of his property 'without due process of law.' Counsel for defendant further say that, 'even if due process of law be held to require compensation, the kind

of compensation may still be determined by the state, and, in the absence of express constitutional provision to the contrary, the property may be compensated for in special benefits, and it is clearly within the province of the state to provide for estimating this compensation in any manner which involves due process of law,—that is, notice and a hearing.' We need not pause to consider this latter proposition. It is not material to the present case. It suggests a question not here involved, because it clearly appears from the pleadings, exhibits, and agreed statement of facts that no 'special benefits' will inure to complainants from the appropriation of their property, but, on the contrary, that it will result in damage to their remaining property. It would be an anomaly to say that property is specially 'benefitted' by the same act which damages it. A further reason for not discussing this last suggestion of defendant's counsel as to the right of the state to determine the kind of compensation that shall be awarded the owner for property taken for public use, is found in the fact that the action of the common council of Toledo herein called in question, as counsel for defendant admits, is not an attempt to pay for the property to be appropriated by the benefits resulting to other property from the appropriation. If such had been the true character of the proceeding, it would clearly violate the provisions of the state constitution, and, independent of the federal questions involved, would entitle complainants to enjoin its enforcement. The single question is therefore presented, whether, in the taking of private property for public use, 'due process of law' requires that compensation shall be

made to the owner for the property so appropriated. In other words, may a state, or any subordinate division thereof, since the adoption of the fourteenth amendment to the constitution of the United States, take the property of its citizen for public purposes without making him compensation therefor? Does 'due process of law,' without which the citizen cannot, under this fourteenth amendment, be deprived of his property by the state, involves as a necessary and essential ingredient the payment or the making of compensation for private property appropriated for public use? This precise question has not yet been passed upon, either by the Supreme Court or the United States or the State courts, so far as we have been able to discover, and it must therefore be considered and determined upon the general principles applicable to the subject.

"No attempt will be made to define the exact scope of the terms 'due process of law.' No court has yet succeeded in giving to these words an exact definition applicable to all the varied cases in which they may be involved. The Supreme Court has said (*Davidson v. New Orleans*, 96 U. S. 104) that, instead of attempting to define what constituted 'due process of law,' it was wiser, in ascertaining the extent and application of such an important phrase of the federal constitution, to adopt the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, and thus, by actual application, give to the words their proper meaning. In a general sense, 'due process of law' is identical in meaning with the phrase, 'law of the land,' as used in the con-

stitution of the several states. Cooley, Const. Lim., 432. As applied to the appropriation of private property for public uses under the power of eminent domain, 'due process of law' clearly does not mean mere legislative enactments, nor simple compliance with the forms of law, nor even constitutional provisions, if they be inconsistent with previously established legal rights. Thus in Cooley, Const. Lim., 433, it is said:

"That construction would render the restriction absolutely nugatory, and turn this part of the constitution into mere nonsense."

And again, (at p. 435).

"The principles, then, upon which the process is based, are to determine whether it is due process or not, and not any consideration of mere form. * * * When the government, through its established agencies, interferes with the title to one's property, or with his independent enjoyment of it, and its action is called in question as not in accordance with the law of the land, we are to test its validity by those principles of civil liberty and constitutional protection which have become established in our system of laws, and not generally by rules that pertain to forms of procedure merely. * * * Due process of law, in each particular case, means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."

To the same effect is the language of the Supreme Court in *Davidson v. New Orleans*, 96 U. S., 192, where the court, speaking by Mr. Justice Miller, after explaining the reasons why the phrase, 'law of the land,' as used in *magna charter*, was not directed against the enactments of parliament, proceeds to say:

"But when, in the year of grace 1856, there is placed in the constitution of the United States a declaration that no state shall deprive any person of life, liberty or property without due process of law, can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation. It seems to us that a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A., shall be and is hereby vested in B., would, if effectual, deprive A. of his property without due process of law within the meaning of the constitutional provision."

"In this case of *Davidson v. New Orleans*, 96 U. S., 107, Mr. Justice Bradley said:—

"If a state, by its laws, should authorize private property to be taken for public use, without compensation, * * * I think it would be depriving a man of his property without due process of law. * * * I think, therefore, we are entitled under the fourteenth amendment, not only to see that there is some process of law, but due

process of law, provided by the state law, when a citizen is deprived of his property; and that, in judging what is due process of law, respect must be had to the cause and the object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessments for local improvements, or none of these; and if found to be suitable or admissible in the special case, it will be adjudged to be due process of law; but if found to be arbitrary, oppressive and unjust, it may be declared to be not due process of law."

"In the Kentucky Railroad Tax Cases, 115 U. S., 331 6 Supt. Ct. Rep. 57, this language of Mr. Justice Bradley is quoted with approval of the Supreme Court. It is a fundamental principle of the common law, established and well settled before the adoption of the federal constitution, that the proper and lawful exercise of the sovereign right of eminent domain involves these two essential elements: viz., that the property must be taken for public benefit, or for public purposes, and that the owner must be compensated therefor. The exercise of the power of eminent domain is, in legal effect, nothing more than an enforced sale for the public benefit, at a fair price, to be ascertained in a proper mode, and to be paid the owner for the property so appropriated. This long and firmly established principle hardly requires any discussion or citation of authority in its support. It is thus clearly and forcibly expressed by one of the earliest and ablest law writers:"

"So great, moreover, is the regard of the law for pri-

vate property, that it will not authorize the least violation of it, no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man or set of men to do this without consent of the owner of the land. * * * In this and similar cases the legislature alone can, and, indeed, frequently does, interpose and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price, and even this is an exertion of power which the legislature indulges with caution, and which nothing but the legislature can perform.' Cooley Bl. bk. 1, p. 137."

"In the same work, (book 2, p. 35, note) on the subject of 'Ways,' it is said:"

"'A public way is established either by the dedication of the owner of the land or by an appropriation of the land for the purpose by the sovereign authority, under what is called the right of eminent domain. When this right is exercised, it must be in pursuance of some express legislative authority which prescribes the formalities, and compensation must be made to the owner.'"

"So, too, in Mills. Em. Dom. § 1, it is said on this subject:"

"The annals of all nations enjoying a constitutional government, and of many despotic nations, show that the moral sense of mankind requires such compensation. In the absence of provisions in the constitution, the courts have considered that the principle was so universal and fundamental that laws not recognizing the right of the subject to compensation would be void."

These well-recognized principles, vital to the security, and essential to the protection, of the citizen against the arbitrary exercise of power on the part of the government were in full force at the adoption of the constitution of the United States. They were not, however, fully recognized in that instrument as originally adopted. The fifth amendment, providing that private property should not be taken for public use without just compensation, was accordingly required for the better security of private property against the power of government. This amendment to the constitution, which recognized and secured to the citizen, as a fundamental principle, the right to compensation for private property taken for public use, was intended as a limitation to the federal power. The first ten amendments to the constitution recognized and secured to all citizens certain rights, privileges, and immunities essential to their security. The fifth amendment operating only as a limitation upon the power of the general government, fell short of giving to the citizen the full protection to which he was entitled in respect to his life, liberty and

property, so far as state action was concerned. It imposed no prohibition or limitation upon the power and authority of the states in dealing with the life, liberty and property of the citizen. They were left to the restraints of their several constitutions and respective laws on these subjects. So far as the states were concerned, citizens of the United States were thus left without adequate protection and security in their persons and property. The fourteenth amendment was adopted to remedy and correct this defect in the supreme organic law of the land. It involves no enforced or unreasonable construction to hold that this fourteenth amendment, as applied to the appropriation of private property for public uses, was clearly intended to place the same limitation upon the power of the states which the fifth amendment had placed upon the authority of the federal government. And as Judge Cooley well remarks:

"'Of these amendments it may be safely affirmed that the first ten took from the Union no power it ought ever to have exercised, and that the last three required of the states the surrender of no power which any free government should ever employ.'

"'Whatever may have been the power of the states on this subject prior to the adoption of the fourteenth amendment to the constitution it seems clear that, since that amendment went into effect, such limitations and restraints have been placed upon their power in dealing with individual rights that the states cannot now lawfully appropriate private property for the public benefit or to

public uses without compensation to the owner; and that any attempt so to do, whether done in pursuance of a constitutional provision or legislative enactment, whether done by the legislature itself or under delegated authority by one of the subordinate agencies of the state, and whether done directly, by taking the property of one person and vesting it in another or the public, or indirectly through the forms of law, by appropriating the property and requiring the owner thereof to compensate himself, or to refund to another the compensation to which he is entitled, would be wanting in that due process of law required by said amendment. The conclusion of the court on this question is that since the adoption of the fourteenth amendment compensation for private property taken for public uses constitutes an essential element in due process of law, and that without such compensation the appropriation of private property to public uses, no matter under what form of procedure it is taken, would violate the provisions of the federal constitution. There is no difference in the principle between the case put by Mr. Justice Miller, as an illustration, in *Davidson v. New Orleans*, 96 U. S., 102, viz., the taking of property from A, and vesting it in B., and the taking of property from an individual and vesting it in the public. 'Due process of law' is equally wanting in both cases; in the latter case, because such a taking, without making compensation to the owner, is nothing short of legalized robbery, or confiscation for the benefit of the public. If, therefore, the statutes of Ohio, whether in harmony with the state constitution or not, authorize the city of Toledo to appropriate the property of complain-

ants for the purpose of a public highway, and to do this in a way which will not only exempt it from duty and obligation of compensating them for the property taken, but imposes upon complainants themselves, under the form of an assessment by the foot front, the burden of compensating themselves or of returning to the city all they may be entitled to receive as compensation for their property, such statutes are wanting in that 'due process of law' required by the federal constitution: and the attempted proceedings had thereunder by the common council of Toledo are void, so far at least, as said assessment is concerned."

We apprehend, however, that the question whether the taking of private property for public use without compensation is a denial of due process of law is definitely settled by the decision of this court in the case of Chicago, B. & Q^c Co. v. City of Chicago, 166 U. S., page 226, where the the question receives the most careful and exhaustive treatment. In the fourth sub-division of the syllabus in that case it is said:

"A judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state, or under its direction for public use, without compensation made or secured to the owner, is wanting in the due process of law required by the fourteenth amendment' and the affirmance of such a judgment by the highest court of the state is a denial by the state of a right secured by the constitution."

In the opinion in this case the leading authorities upon this subject are cited, and nothing further is left to be said.

Having disposed of that part of this case which goes to the jurisdiction of this court on the ground that the taking of private property for public use constitutes a denial of due process of law it only remains to discuss the question whether or not there has actually been such denial in the case at bar, and whether the record in this case shows that the property of the plaintiff in error has been actually taken for public use without compensation.

It was contended by counsel for plaintiff in error in the state court that the said Agricultural Society is a private corporation. If this is true, then we have a case involving the taking of private property for private use, which if possible is more obnoxious to the "law of the land" than the taking for public use. As far as the principle at stake is concerned it matters not which view we take of the status of the Agricultural Society in this respect. White v. White, 5 Barbour, 484, 485. Had the plaintiff in error not executed and delivered an approved supersedeas bond long before this, doubtless, his sixty lots would have been sold to raise money to apply on the judgment against him for paving assessment. By the stipulation and demurrer it is conceded that said lots, if sold at their fair market value, would not have brought enough to pay the judgment.

This fact then is certain, the plaintiff in error would have been deprived of the entire ownership of his property. Now who did this act of alienation? It cannot be conceived that any one will claim that the plaintiff in error himself did it. The only answer possible to be made is that the plaintiff in error was deprived of his property by force of a contract made and enforced by the city council of the city of Des Moines.

The plaintiff in error has, without any fault or act of his own, been totally divested of his ownership. What compensation has he received? Who will have the hardihood to say that he has received; or in any manner can receive, directly or indirectly, a single farthing? Leaving out of sight that enormity, the personal judgment for a general execution to collect the deficiency, no subtlety of casuistry can cover up the fact that he has received, and will receive no compensation. Having received no compensation for this spoilation of his property, what benefit has the plaintiff in error received? The record does not show that he owns any other real estate in the vicinity of Des Moines, and we think it is a fact that he does not. The only benefit that can possibly be conceived is on the theory that the plaintiff in error is a self-denying philanthropist who receives delight in knowing that the good people of Polk county, Iowa, do not have to drive in the mud for at least one mile on their annual pilgrimages to the State Fair.

If the paving was not a wonton expenditure without use or benefit to any one, it follows that the general pub-

lic and the State Agricultural Society are the sole beneficiaries. The only constitutional ground for imposing any lien on the lots of the plaintiff in error is totally lacking in this case. I quote from the opinion of Mr. Justice Shepperd, in *City of Raleigh v. Peace*, 14 S. E., 525, (N. C.):

"We are of the opinion, however, that no personal judgment can be rendered against the abutting owner, and that so much of the amendment to the charter which provides for such a judgment is invalid. It is true that in *Willmington v. Yopp*, *supra*, such a judgment was rendered, but the point was not presented and passed upon by this court; the only question decided being the validity of special assessments of this character, and not the manner of their enforcement. We feel at liberty, therefore, to examine into the constitutionality of the act authorizing the judgment in question; and in doing so we cannot better express our views than by quoting the language of Mr. Elliott: 'It is not easy to perceive how the assessment can extend beyond the property against which it is directed, since the sole foundation of the right to direct and enforce the assessment rests upon the theory that the land receives a benefit equal to the assessment. If the land, with the super-added value given to it by the improvement, will not pay the assessment, there is no constitutional warrant for the right to seek payment of the assessment elsewhere; for the land is all that the improvement can by any possibility benefit, and land (or other property) that is not benefited can not be seized without

violating the principle which forbids the taking of property without compensation, nor without breaking down the only theory upon which it is possible to sustain local assessments, and yet if there is a personal liability the assessment may be enforced, although the land, even as enhanced in value by the improvement, may not be worth a tithe of the extent of making the improvement. * * * The decisions which declare statutes imposing a personal liability upon the land-owner unconstitutional are, in our judgment, so strongly entrenched in principle that they cannot be shaken. Elliott v. Roads and S., 400. Such, also is the opinion of Judge Cooley, (Taxation, 675), who says that 'in such a case, if the owner can have his land taken from him for a supposed benefit to the land which if the land is sold for the tax, it is thus conclusively shown he has not received, and he is then held liable for a deficiency in the assessment, the injustice—not to say the tyranny—is manifest. But such a case is liable to occur if assessments are made a personal charge; and cases like it in principle, though less extreme in the injury they inflict, are certain to occur.' The foregoing reasons are entirely conclusive in our minds, and are well sustained by authority.

Higgins v. Ausmuss, 77 Mo., 35.

Neenan v. Smith, 50 Mo., 525.

Macon v. Patty, 57 Miss., 378.

Craw v. Tolono, 96 Ill., 255.

Gaffney v. Gough, 36 Cal., 104.

Baptist Church v. McAtee, 8 Bush, 508.

Burlington v. Quick, 47 Iowa, 226.

Green v. Ward, 82 Va., 324."

The third assignment of error by the plaintiff in error is as follows, record page 47:

"Third That the said judgment is not sustained or procured by due process of law, for the reason that Supreme Court of Iowa, in case of State ex rel. West v. City of Des Moines, 65 N. W. Rep., 818, has formally adjudged and decreed that the act of annexation under and by authority of which said paving tax was assessed is unconstitutional and void, of which judgment this court will take judicial notice, and therefore all acts of the city officers by virtue of said statute are void."

In the case above mentioned, the Supreme Court of Iowa held that the act under which the boundaries of the city of Des Moines were extended was void, because, although the act was drawn in the guise of a general law, it was in fact a special law for the reason that the city of Des Moines was the only city in the state of Iowa that possessed the conditions required by the act. If the act was void it seems impossible that the ordinances of the city council of Des Moines extending the boundaries of the city, under the void act, could have any vitality or validity. The stream cannot rise higher than its source. It seems to the writer that if this court will take judicial notice of the above mentioned decision of the Supreme of Iowa the record shows that there was neither "due,"

nor in fact any process of law in the proceedings upon which the assessment was founded.

It is true that the Supreme Court of Iowa hold that by laches the state or any individual is estopped from attacking the validity of the subsequent act of corporation, or the validity of indebtedness contracted for improvements made thereunder, but this was grounded on doubtful expediency, which is not binding on this court. The decision of the highest court of the state of Iowa holding that the act of the legislature providing for annexation is void, would probably be binding on this court, but the policy of expediency announced by the court to avoid the logical and necessary results of its decision is not binding on this court, nor do we believe it is sustained by either authority or good reason.

Sultro v. Pettit, 74 Cal., 332.

Were not other questions which seem to be decisive of this case presented by the record, which have been fully discussed, it might be desirable to enter into a more extended discussion of this point, but as the case stands we do not feel justified, nor is it necessary to take up the further time of the court.

Respectfully submitted,

AMASA COBB,

ANDREW E. HARVEY.

Papillion

REPLY BRIEF OF PLAINTIFF IN ERROR TO THE
SUPPLEMENTAL BRIEF OF DEFENDANTS IN ERROR.

Des Moines, Iowa, April 1899.

A. E. HARVEY,

Plaintiff in Error.

CITY OF DES MOINES ET AL.,

Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

REPLY BRIEF OF PLAINTIFF IN ERROR TO THE
SUPPLEMENTAL BRIEF OF DEFENDANTS IN
ERROR.

A. E. HARVEY,

Attorney for Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 122.

C. P. DEWEY, *Plaintiff in Error,* }
vs. } IN ERROR TO THE SUPREME COURT
CITY OF DES MOINES, ET AL., *Defendants in Error.* } OF THE STATE OF IOWA.

A. E. HARVEY, *Attorney for Plaintiff in Error.*

REPLY BRIEF OF PLAINTIFF IN ERROR TO THE SUPPLEMENTAL BRIEF OF DEFENDANTS IN ERROR.

In the supplemental brief of defendant in error, counsel cites cases, not principles. The cases cited, when illumined by the light of the great principles underlying this question, will not bear the constructions sought by him to be made.

Between the position of counsel backed by the Iowa courts, and "the law of the land," there is a gulf which can not be bridged over.

To concede the position they have taken as correct would be to withdraw from the rights of property the guaranties of the constitution that private property shall not be taken for public use without compensation. The Iowa courts calmly proclaim that benefits to be received by the property owner is not a factor in support of the right of special assessments upon abutting property. It is sufficient if there shall be a resulting public benefit, however ruinous it be to the property owner who must bear the burden. It is boldly contended that all of his property abutting on the improved street can be appropriated, and if this will not be sufficient to pay the cost of the improvement, then by means of a personal judgment and a general execution, his farm (if he have one) in some other locality can be seized and sold to raise money to pay the deficiency.

It must not be overlooked that the conceded facts are that Mr. Dewey's lots were not worth the cost of the assessment, after the work had been done, and that the city council of Des Moines knew it when the work was ordered, that the work was ordered upon the sole solicitation of the State Fair Association and for its sole benefit. Of course, then there was no benefit that could possibly accrue to Mr. Dewey. The judgment of the Iowa Court contemplates the sale of all his lots, and then a general execution against him in order to raise the balance of the judgment.

The fact is the city council of Des Moines acted purely upon the peculiar conception of the Iowa courts that particular private property can be made to bear the burden of an improvement for the general benefit, regardless of any question of private benefit.

It seems scarcely necessary for me to point out the fact that all of the cases cited by counsel upholding the right of taxation, and that taxation is not a taking of private property for public use without compensation, is based upon, and contemplates, only *general* taxation, and presupposes that the burden will be shared by all the public alike. The author of Cooley on Taxation would have been amazed to find that he had been quoted to sustain the proposition that special assessments upon abutting property of owners who should bear the entire cost could be sustained on the general theory of taxation.

It would be unnecessary for me to cite authorities to this court, to sustain the proposition that all special assessments find their only justification in the fact that the property specially assessed will be improved in value, to the extent of the cost of the assessment.

The authorities cited by counsel in support of special assessments all go on the theory that there shall be a corresponding benefit to the property owner, and the arguments of all these cases are for the purpose of sustaining the right to make such an assessment *when there is a resulting benefit to the property owner*, such right having been denied in many cases. Counsel now seeks to make these cases apply in support of an assessment resulting in no benefit to the property owner and where, as in this case, it was never contemplated by the authorities imposing the burden that the work would be a benefit to him.

It is a gross perversion to seek to make such cases support the Iowa doctrine.

As to the decisions of this court upon the "conclusive presumptions" of benefits received by reason of the act of the legislature, which can not be questioned by the property owner, I will only repeat what I said in oral argument: "that this court evidently never contemplated that such a proceeding, as is disclosed by this record, should be attempted to be supported by a reliance upon *Davidson vs. New Orleans*, 96 U. S., 97, or *Mobile County vs. Kimball*, 102 U. S., 704, or *Spencer vs. Merchant*, 125 U. S., 345, and other cases cited by counsel for defendant in error.

The theory of counsel permits the taking of private property without a hearing, because the property owner will not be heard to contradict the "conclusive presumption" that his property has been benefited, even though, as in this case, it is admitted in the pleadings that the property owner is not benefited, but on the contrary that the assessment amounts to a confiscation of his property.

If the opinion of this court in *Village of Norwood vs. Baker* needed an example to prove the necessity of such a decision, it is surely furnished in the case at bar. What difference in principle can there be between a case where land was appropriated for a public road, and a case where the road being already opened, the adjoining land is appropriated to improve it. It seems absurd to call this the legitimate exercise of general taxing power.

I will close by briefly referring to counsel's claim that a Federal question was not raised in the Iowa court. That a Federal question was not first raised in plaintiff's bill is of no consequence. This court has repeatedly held that a

Federal question can be raised for the first time in the assignments of error in the supreme court of a state. It was done in this case. The supreme court of Iowa at some length discussed the question whether there was a denial of due process of law by the proceedings in this case, and that, too, without reference to the question of notice.

This court has held that due process of law requires that private property shall not be taken for public use without compensation. Therefore when the question of due process of law was raised, the lesser was included in the greater, and passed upon by the supreme court of Iowa. I see no force in counsel's position. If the guaranties furnished by the 14th amendment of the constitution of the United States were called to the attention of the supreme court of the state of Iowa, that court will be presumed to have done what it ought to have done, which was to carefully investigate and ascertain whether every right of the plaintiff in error prescribed by "due process of law" had been accorded to him in the proceeding shown by the record before it. The supreme court of Iowa in its opinion quoted from *Davidson vs. New Orleans* to show that "due process of law" had not been denied to plaintiff in error. How then can it be asserted that the question was not raised in the Iowa court?

A. E. HARVEY,
Attorney for Plaintiff in Error.



No. 129.

FILED

NOV 21 1898

JAMES H. MCKENNEY,
Clerk.

Brief of Guernsey for D. C.

Filed Nov. 27, 1898.
Supreme Court of the United States.

OCTOBER TERM, 1898.

NO. 122.

C. P. DEWEY, PLAINTIFF IN ERROR,

vs.

CITY OF DES MOINES, C. H. DILWORTH, COUNTY
TREASURER OF POLK COUNTY, AND DES
MOINES BRICK MANUFACTURING COM-
PANY, DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE
OF IOWA.

BRIEF IN BEHALF OF CITY OF DES MOINES AND DES
MOINES BRICK MANUFACTURING COMPANY,
DEFENDANTS IN ERROR.

N. T. GUERNSEY,

Attorney for Said Defendants in Error.



IN THE
Supreme Court of the United States.

OCTOBER TERM, 1898.

C. P. DEWEY, *Plaintiff in Error,*

vs.

CITY OF DES MOINES, C. H. DILWORTH
COUNTY TREASURER OF POLK COUNTY, AND
DES MOINES BRICK MANUFACTURING
COMPANY, *Defendants in Error.*

BRIEF OF THE DES MOINES BRICK MANUFACTURING
COMPANY, AND THE CITY OF DES MOINES
DEFENDANTS IN ERROR.

In this suit the plaintiff in error, Dewey, seeks to have cancelled certain special taxes levied against him and his property on account of the expense of paving a street in the city of Des Moines.

The city having properly adopted the resolution ordering the pavement on March 15th, 1892, contracted with J. B. Smith & Company to do the work, the contract providing, among other things, that the total cost of the work should be charged to the abutting property, and that the contract-

ors should receive as their compensation the assessment certificates evidencing the assessment to be made by the city to defray the expense of this improvement. Under the laws of Iowa these assessments are a personal liability of the owner as well as a lien on the abutting property.

J. B. Smith & Company having completed the work, the certificates, including those in controversy in this action, were issued May 19th, 1893, and delivered to the contractors. The plaintiff in error was the owner of considerable abutting property included in this assessment. April 30th, 1894, he commenced this suit by filing his bill in equity in the district court of the state of Iowa in and for Polk county, in which he asked a decree cancelling the entire assessment and enjoining the city and county authorities from enforcing it to any extent. The Des Moines Brick Manufacturing Company (which we shall hereinafter designate as the Brick Company) having become the owner of these certificates, was joined with the city and proper county officials as one of the defendants.

Omitting certain purely local matters which are immaterial here, the grounds upon which the plaintiff attacked this assessment were:

(a) That no personal liability could be imposed on him because no personal notice of the proceedings contemplated had been given him, the only notice being a notice given by publication in the newspapers and by posting along the line of the work. In this connection to show clearly that a personal liability was inevitable the plaintiff averred that the assessment against each of his lots exceeded the value of that lot and that the aggregate assessment against all his lots exceeded their aggregate value.

(b) That the entire proceeding was invalid because the territory where the work in question was done was annexed to the city of Des Moines under an act of the legislature of Iowa which was void because special in its character, and so prohibited by the constitution of that state.

In the record in the trial court the constitution of the United States is nowhere mentioned and no right or immunity is specially set up or claimed under it. There is no allegation that the plaintiff has paid or tendered or that he tenders or offers to pay any part of this tax.

While it is alleged that the assessments exceed the value of the lots, it is not alleged that this was true when the contract was let or when the work was done, or when the assessment was made; nor is there any averment as to the amount of the alleged excess, so that if it were one dollar or one cent it would be sufficient to support the averments of the bill.

The Brick Company answered the bill, and also filed a cross-bill seeking to enforce the certificates against the property and asking a personal judgment against Dewey.

In reply to the cross-bill Dewey set up practically what was contained in his bill.

The Brick Company thereupon filed its motion to strike from the bill and answer to the cross-bill, substantially all the matters relied upon as invalidating the assessment. Counsel having by stipulation agreed that the charges of fraud in the bill be withdrawn, and that the motion be treated as a demurrer, it was, with a general demurrer filed by the other defendants, sustained, and a decree was entered against Dewey for the amount of the certificates which was made a lien upon the lots.

Thereupon Dewey appealed to the supreme court of Iowa. In that court the question made here as to taking property without compensation was not even suggested, nor was it a question which could have been made on the record there. The question growing out of the annexation proceedings urged here was expressly waived there. Consequently neither of the questions as to which it is sought here to review the decision of the supreme court of Iowa, was presented to or considered by that court.

The legislation in Iowa on this subject shows that practi-

cally ever since the state's admission it has been its policy to make special assessments a personal charge against the abutting owner, as well as a lien on his property.

The supreme court of Iowa, in a long line of decisions has upheld these statutes. That court, also many years before the plaintiff in error acquired this property, announced the doctrine which is settled law in Iowa, that special assessments are sufficiently supported as an exercise of the taxing power by the benefit that ensues to the public at large; so that so far as the validity of such assessments is concerned it is unnecessary to consider the benefits to abutting property as compared with the cost of the work, because in this aspect of the matter the amount of such benefits is immaterial.

BRIEF AND POINTS.

I.

The claim that the assessment in controversy constitutes a taking of the property of plaintiff in error without compensation in contravention of the federal constitution was not specially set up or claimed in the court below and cannot be urged here.

This question was not specially set up in the pleadings.

Oxley Stave Co. vs. Butler County, 166 U. S., 648-654.
Louisville & Nashville R. R. Co. vs. Louisville, 166 U. S., 709.

Union Mutual Life Insurance Co. vs. Kirchoff, 18 Sup. Ct. Rep., 260.

The only federal question made by the assignments of error in the supreme court of Iowa was as to the sufficiency of the notice, and no other question could have been urged there.

Powers vs. County of O'Brien, 54 Iowa, 501.

Patterson vs. Jack, 59 Iowa, 632.
Fink vs. Mohn, 85 Iowa, 739.

II.

The failure on the part of the plaintiff in error to tender any part of the assessment constituted a complete defense and rendered the determination of any federal question unnecessary.

State Railroad Tax Cases, 92 U. S., 575.
National Bank vs. Kimball, 103 U. S., 732.
Albuquerque Bank vs. Perea, 147 U. S., 87.
Grimmell vs. City of Des Moines, 57 Iowa, 144.
Morrison vs. Hershire, 32 Iowa, 271.
Dibble vs. Bellingham Bay Land Co., 163 U. S., 63.
Eustis vs. Bolles, 150 U. S., 361.
Winter vs. Montgomery, 156 U. S., 385.
Hammond vs. Johnston, 142 U. S., 73.
Hammond vs. Gordon, 150 U. S., 633.

III.

The tax in controversy was not a taking of private property for a public purpose without compensation.

(a) The power exercised was the power of taxation and not that of eminent domain.

Bauman vs. Ross, 167 U. S., 589.
County of Mobile vs. Kimball, 102 U. S., 691.
Davidson vs. New Orleans, 96 U. S., 97.
Hagar vs. Reclamation District, 111 U. S., 701.
Spence vs. Merchant, 125 U. S., 345.
Walston vs. Névin, 128 U. S., 578.
Lent vs. Tillson, 140 U. S., 316.
Illinois Central Railroad Co. vs. Decatur, 147 U. S., 190.
Paulsen vs. Portland, 149 U. S., 30.
Willard vs. Presbury, 14 Wall, 676.

Mattingly vs. District of Columbia, 97 U. S., 687.
Shoemaker vs. United States, 147 U. S., 282.
People vs. Brooklyn, 4 N. Y., 419-430.
City of Parkersburg vs. Tavenner, 26 S. E. Rep., 179.
Cooley on Taxation, page 624.
Rolph vs. City of Fargo, 76 N. W. Rep., 242.

(b) The amount of the benefits is not an open question.

Spencer vs. Merchant, 125 U. S., 345.
Fallbrook Irrigation District vs. Bradley, 164 U. S., 112.
Bauman vs. Ross, 167 U. S., 589.
Cooley on Constitutional Limitations, sixth edition,
page 599.

(c) The tax in question is not vulnerable to the objection urged against it.

The argument that the burden exceeds the benefit must fall because of the conclusive determination by the state that the property has been benefited to the extent of the charge made against it.

(d) The legislature of the state had the power to impose this tax.

The law assailed provides for a hearing.

Sec. 10, Chap. 168, Acts 21st General Assembly. (See Appendix).

Polk vs. McCartney, 104 Iowa, 567.
Gilebrest vs. McCartney, 97 Iowa, 138.
Coggeshall vs. City of Des Moines, 78 Iowa, 235.
Dittoe vs. Daveuport, 74 Iowa, 66.
Muscatine vs. C. R. I. & P. R. Co., 79 Iowa, 645.
Farwell vs. Des Moines Brick Mfg. Co., 97 Iowa, 286.
Muscatine vs. C. R. I. & P. R. Co., 88 Iowa, 291.
McManus vs. Hornaday, 99 Iowa, 507.
Osburn vs. Lyons, 104 Iowa, 160.
Tuttle vs. Polk, 92 Iowa, 433.

The notice is sufficient.

- Davidson vs. New Orleans, 96 U. S., 97.
- Hagar vs. Reclamation District, 111 U. S., 701.
- Lent vs. Tillson, 140 U. S., 316.
- Paulsen vs. Portland, 149 U. S., 30.

The rule in Iowa has always been to impose a personal liability.

- See statutes in appendix hereto.
- Farwell vs. Brick Co., 97 Iowa, 286.
- City of Burlington vs. Quick, 47 Iowa, 222.
- Sioux City vs. Independent District, 55 Iowa, 150.

The tax is supported by the benefit to the public aside from the question of benefits to the abutting property.

- Dewey vs. City of Des Moines, 101 Iowa, 416.
- Warren vs. Henly, 31 Iowa, 31.
- City Dubuque vs. Illinois Central R. Co., 39 Iowa, 56.

This being a tax for a public purpose, the entire cost must be raised by taxation, and how this shall be apportioned is a matter of purely legislative discretion.

- Davidson vs. New Orleans, 96 Iowa, 97.
- Mattingly vs. District of Columbia, 97 U. S., 687.
- Willard vs. Presbury, 14 Wall., 676.
- County of Mobile vs. Kimball, 102 U. S., 691.
- Hagar vs. Reclamation District, 111 U. S., 701.
- Spencer vs. Merchant, 125 U. S., 345.
- Walston vs. Nevin, 128 U. S., 578.
- Lent vs. Tillson, 140 U. S., 316.
- Fallbrook Irrigation District vs. Bradley, 164 U. S., 112.
- Bauman vs. Ross, 167 U. S., 548.
- Rolph vs. City of Fargo, 76 N. W. Rep., 242.

This proceeding is in accordance with what was the settled

law of Iowa when the plaintiff in error acquired his property, and had been the law there for many years heretofore, and is therefore due process of law.

Eldridge vs. Trezenant, 160 U. S., 460.

IV.

The alleged Invalidity of the annexation law.

No federal question is presented by the record arising out of this matter.

This question, which arose under the constitution of Iowa, was expressly waived in the supreme court of that state and was not presented to that court.

Answering it upon the merits:

(a) It has been adjudicated by the supreme court of Iowa that the municipal organization under the annexation proceedings in question is valid.

State ex rel. vs. City of Des Moines, 96 Iowa, 521.

(b) The validity of the municipal organization is not subject to attack in a collateral proceeding of this character.

Shapleigh vs. San Angelo, 167 U. S., 651.

National Life Insurance Co. vs. Board of Education of City of Huron, 62 Fed. Rep. 778, 27 U. S. App., 244.

Beach on Public Corporations, Sec. 55.

Cooley's Constitutional Limitations, sixth edition, page 309-310.

City of St. Louis vs. Shields, 62 Mo., 251.

Town of Geneva vs. Cole, 61 Ill., 397.

(c) No federal question could arise here.

McCain vs. City of Des Moines, 84 Fed. Rep., 726.

ARGUMENT.

I.

The claim that the assessment in controversy constitutes a taking of the property of plaintiff in error without compensation in contravention of the federal constitution was not specially set up or claimed in the court below and cannot be urged here.

This contention was not asserted in the *nisi prius* court, or in the supreme court of Iowa; it is presented here for the first time. It was not involved in the case as presented to the supreme court of Iowa; it could not have been urged upon the record there, and was not passed upon by that court.

The only averments in the pleadings upon which reliance is placed in this connection are found in paragraph five of the plaintiff's petition (record page 3) which is as follows:

That plaintiff had no actual notice or knowledge of the resolutions of the city council aforesaid to pave said street until after the completion and acceptance of the work on same, nor did he have any such notice or knowledge of said special tax until he applied to the county treasurer of Polk county for a statement of the general taxes upon his property, in the month of March, 1894. That plaintiff had no actual notice or knowledge that paving certificates had been issued against his property hereinbefore described, nor had he any notice or knowledge of the right or opportunity to sign the waiver upon such paving certificates, provided for in the statute and ordinance under which said work was done; and plaintiff had no constructive knowledge in respect to any of the matters aforesaid, except such as might be afforded by publications in newspapers in the city of Des Moines and posting notices along the street in respect thereto. That the amount of said tax is greater than the reasonable market value of said lots, whether considered singly or together; the assessment against each particular lot being greater in amount than the value of such particular lot, and the aggregate assessment being greater in amount than the reasonable market value of all of said lots taken together; and that said defendants are seeking to enforce as against plaintiff not merely a sale of said lots but also to compel

plaintiff to pay the full amount of said tax regardless of whatever sum said lots may be sold for and regardless of the actual value of the same.

This paragraph does not specially set up or claim the protection of the constitution of the United States. The averments are too general, and whether or not it was intended to assert a federal right is left to mere inference, and is wholly a matter of conjecture. The case of

Oxley Stave Co. vs. Butler County, 166 U. S., 648-654, is conclusive upon this question. We quote from the opinion as follows:

The only remaining question was not otherwise raised than by the general allegation that the decree was rendered against dead persons as well as in the absence of necessary parties who had no notice of the suit and therefore no opportunity to be heard in vindication of their rights. Do such general allegations meet the statutory requirement that the final judgment of a state court may be re-examined here if it denies some title, right, privilege or immunity "specially set up or claimed" under the constitution or authority of the United States? We think not. The specific contention now is that the decree of the Butler county circuit court in the suit instituted by the county of Butler was not consistent with the due process of law required by the fourteenth amendment of the constitution of the United States. But can it be said that the plaintiffs specially set up or claimed the protection of that amendment against the operation of that decree by simply averring—without referring to the constitution or even adopting its phraseology—that the decree was passed against deceased persons as well as in the absence of necessary or indispensable parties?

This question must receive a negative answer, if due effect be given to the words "specially set up or claimed" in section 709 of the Revised Statutes. These words were in the twenty-fifth section of the Judiciary act of 1789 (1 Stat. 85), and were inserted in order that the revisory power of this court should not extend to rights denied by the final judgment of the highest court of a state, unless the party claiming such rights *plainly and distinctly indicated, before the state court disposed of the case,* that they were claimed under the

constitution, treaties or statutes of the United States. The words "specially set up or claimed" imply that if a party intends to invoke for the protection of his rights the constitution of the United States, or some treaty, statute, commission, or authority of the United States, he must so declare; and, unless he does so declare "specially" (that is, unmistakably), this court is without authority to re-examine the final judgment of the state court. *This statutory requirement is not met if such declaration is so general in its character that the purpose of the party to assert a federal right is left to mere inference.* It is the settled doctrine of this court that the jurisdiction of the circuit courts of the United States must appear affirmatively from the record, and that it is not sufficient that it may be inferred argumentatively from the facts stated. Hence the averment that a party resides in a particular state does not import that he is a citizen of that state. Brown v. Keene, 8 Pet. 115; Robertson v. Cease, 97 U. S. 646, 649. Upon like grounds the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a federal right.

As the argument at the bar indicated some misapprehension as to our decisions upon this subject, it will be appropriate to refer to some of them.

In Maxwell v. Newbold, 18 How. 511, 516, which was a writ of error to the supreme court of Michigan, this court, speaking by Chief Justice Taney, and referring to the twenty-fifth section of the judiciary act of 1789, and the interpretation placed upon it in Crowell v. Randall, 10 Pet. 368, said: "Applying this principle to the case before us, the writ of error cannot be maintained. The questions raised and decided in the state circuit court point altogether for their solution to the laws of the state, and make no reference whatever to the constitution or laws of the United States. Undoubtedly, this did not preclude the plaintiffs in error from raising the point in the supreme court of the state, if it was involved in the case as presented to that court. And whether a writ of error from this court will lie or not depends upon the questions raised and decided in that court. But neither of the questions made there by the errors assigned refer in any manner to the constitution or laws of the United States, except the third, and the language of that is too general and indefinite to come within the provisions of the act of congress, or the decisions of this court. It alleges that the

charge of the court was against, and in conflict with, the constitution and laws of the United States. But what right did he claim under the constitution of the United States which was denied him by the state court? Under what clause of the constitution did he make his claim? And what right did he claim under an act of congress? And under what act, in the wide range of our statutes, did he claim it? The record does not show; nor can this court undertake to determine that the question as to the faith and credit due to the record and judicial proceedings in Ohio was made or determined in the state court, or that that court ever gave an opinion on the question. For aught that appears in the record, some other clause in the constitution, or some law of congress, may have been relied on, and the mind of the court never called to the clause of the constitution now assigned as error in this court." After stating the grounds upon which the decision in *Lawler v. Walker*, 14 How., 149, was placed, the court proceeded: "So in the case before us the clause in the constitution and the law of congress should have been specified by the plaintiffs in error in the state court, in order that this court might see what was the right claimed by them, and whether it was denied to them by the decision of the state court."

In *Hoyt v. Sheldon*, 1 Black, 518, 521 (a writ of error to review the final judgment of a New York court), it was contended that full faith and credit were not given by that court to certain legislative enactments and judicial proceedings in the courts of New Jersey, as required by the constitution of the United States. This court, again speaking by Chief Justice Taney, said: "But, in order to give this court the power to revise the judgment of the state court on that ground, it must appear upon the transcript filed by the plaintiff in error that the point on which he relies was made in the New York court, and decided against him, and that this section of the constitution was brought to the notice of the state court, and the right which he now claims here claimed under it. The rule upon this subject is clearly and fully stated in 18 How., 515 (*Maxwell v. Newbold*), as well as in many other cases to which it is unnecessary to refer. This provision of the constitution is not referred to in the plaintiff's bill of complaint in the state court, nor in any of the proceedings there had. It is true, he set out the act of the legislature of New Jersey, the proceedings and decree of the chancery court of that state under it, and the sale of the property in dispute by the authority of the court, which he alleges transferred the title to the vendee under whom he

claims, and charges that the assignment set up by the defendant was fraudulent and void, for the reasons stated in his bill. But all of the matters put in issue by the bill and answers, and decided by the state court, were questions which depended for their decision upon principles of law and equity, as recognized and administered in the state of New York, and without reference to the construction or effect of any provision in the constitution, or any act of congress. This court has no appellate power over the judgment of a state court pronounced in such a controversy, and this writ of error must therefore be dismissed for want of jurisdiction."

This doctrine is reaffirmed in the

Louisville & Nashville Railroad Co. vs. Louisville, 166 U. S., 709.

The court says:

"A definite issue as to the validity of the statute or the possession of the right must be distinctly deducible from the record before the state court can be held to have disposed of such a federal question by its decision."

This doctrine is reaffirmed by this court in the case of the
Union Mutual Life Insurance Co. vs. Kirchoff, 18 Sup.
Ct. Rep., 260.

decided January 10, 1898, which is not yet reported in the official series of reports.

Without carrying this discussion further it is manifest that in the averments of the petition itself, and in the record in the trial court, no right under the federal constitution was specially set up or claimed. It is urged here for the first time.

This paragraph of the petition obviously presents solely the proposition that this liability could not be enforced because there had been given no personal notice. The allegation as to the value of the lots, at the end of the paragraph, is shown by the context to have been added solely

for the purpose of making it clear that some personal liability would be inevitable. Whether the pleader intended to invoke the constitution of Iowa, or of the United States or both, is in no wise disclosed.

The fourth assignment of error (record, page 33) embraces this question with another. It is as follows:

The court erred in holding and deciding that plaintiff was personally liable to said Des Moines Brick Manufacturing Company for so much of said special tax or assessment as could not or would not be realized by a sale of the sixty lots in question on special execution, and in ordering and adjudging that a general execution should issue against plaintiff and in favor of said Des Moines Brick Manufacturing Company for the balance of such tax or assessment; and further that, as plaintiff was at all times a non-resident of the state of Iowa and had no personal notice or knowledge of the assessment proceedings, that the imposition of a personal liability against him, in excess of the value of all the lots, was not due process of law and was in contravention of the provisions on that subject of the fourteenth amendment to the Constitution of the United States, as well as in contravention of the provisions of the constitution of the State of Iowa on the same subject.

The first question here suggested is whether by their terms the statutes impose a personal liability. This question of purely state law is discussed in the third subdivision of the opinion of the court below. (Record, page 40.)

The next question is whether the notice upon which this tax was founded was sufficient to sustain it, and here we have for the first time in this record an attempt to specially claim a right under the Constitution of the United States. That this alleged defective notice was the only federal question claimed by counsel for the plaintiff in error in the supreme court of Iowa clearly appears from the following extract from their brief here (page 11) from which we quote.

The counsel for plaintiff in error in the State Court seem to have relied upon one single proposition only as involving

a federal question, to-wit: "As plaintiff was at all times a non-resident of the state of Iowa, and had no personal notice or knowledge of the assessment proceedings, that the imposition of the personal liability against him in excess of the value of all the lots was not due process of law and was in contravention to the provisions on that subject of the fourteenth amendment to the Constitution of the United States."

It is true that this was the only federal question presented to that court; moreover this is the only federal question considered or determined by the supreme court of Iowa in its opinion in this case. (See the fourth division of the opinion, record page 40).

Under the practice of that court this was the only federal question which could be raised in that court on this record, because it was the only federal question raised by the assignment of errors there.

Under the practice in Iowa an equity case which is tried upon the merits in the *nisi prius* court is triable *de novo* in the supreme court and no assignment of errors is necessary. The rule is well settled, however, that where there is an appeal from an order sustaining or overruling a motion or demurrer error must be assigned. The first case in Iowa announcing this doctrin is

Powers vs. County of O'Brien, 54 Iowa, 501.

We quote a single sentence from the opinion.

"We think, considering these sections of the statute together, in connection with the constitutional provision, exception should be taken and errors assigned, whenever a party in an equity case stands upon the ruling upon a motion or demurrer and appeals therefrom."

See also

Patterson vs. Jack, 59 Iowa, 632.

The rule is reaffirmed in

Fink vs. Mohn, 85 Iowa, 739.

We quote the entire opinion:

The plaintiff filed her petition in equity, to which the defendants demurred upon the grounds, among others, that the petition shows on its face that the plaintiff is not entitled to the relief demanded, nor to any relief; that it shows that John Fink, the deceased, made no false representation as to any existing fact to induce the plaintiff to sign the deed, and that it shows that the plaintiff's claim, if she ever had one, is barred by the statute of limitations. The demurrer was sustained on these grounds, to which plaintiff excepted, refusing to further plead. Judgment was entered dismissing her action and for costs, from which she appeals.

—Dismissed.

GIVEN, J.—The appellees move to strike the appellant's abstract and argument because no errors had been assigned or pointed out, and because no argument has been made by appellant on any error assigned. By referring to Code, section 2742, it will be seen that it is only "in equitable actions, wherein issue of fact is joined," that the case is triable anew in this court. The case is not before us on issues of fact, for none were ever joined. The appeal is from a ruling on the defendants' demurrer to the plaintiff's petition. In Powers vs. O'Brien County, 54 Iowa, 501, and Patterson vs. Jack, 59 Iowa, 632, it was held that on appeal in an equitable case from a ruling upon motion or demurrer, exceptions must be taken and errors assigned as in an action by ordinary proceedings, and the hearing will be only upon errors assigned. This case furnishes an apt illustration of the propriety of the rule. The appellant's petition is quite lengthy, embracing ten paragraphs, covering six closely printed pages. The appellant has not pointed out, either by assignment of errors or in argument, wherein it is claimed that the court erred in sustaining the demurrer. The appellees' motion to strike the abstract is sustained, and the appeal DISMISSED.

This rule governed the case at bar, as the only complaint made by Dewey there or here grows out of the ruling on the motion or demurrer of the defendants.

Since, therefore, an assignment of errors was necessary

in the supreme court of Iowa, and Dewey by his assignment of errors there pointed out to the supreme court of Iowa specifically the error which he claims had been made by the court below, he was limited in that court to the particular claim made in this assignment of error. By assigning as error this specific matter he waived the right to assert in the supreme court of Iowa anything else.

It is admitted by his counsel here that Mr. Dewey did not assert in that court anything except the error which he specifically assigned, and it appears from the opinion of that court that this is the only question which it considered or passed upon.

Counsel say in their brief immediately after the extract we have just made from it that they "can discover no reason for thus limiting and narrowing down this constitutional federal question" to this single question that was presented to the supreme court of Iowa. We confidently submit that the facts to which we have just adverted are a conclusive reason why the inquiry in that court was limited to this question, and why in this court another question cannot for the first time be presented and argued. The appellant cannot ask this court to review this case upon a proposition that he not only did not present to the supreme court of Iowa but which he had not the right to present to that court.

The plaintiff in error is bound to affirmatively show that the rights which he claims here were specially claimed under the federal constitution in the court below. He not only has failed to do this, but further than this the record affirmatively shows that his sole proposition here, viz., that his property was taken without compensation, was not raised in the supreme court of the state and could not have been raised upon the record presented to that court.

The question of notice, which was the only matter set up, or urged, in the supreme court of the state, has been abandoned by counsel; their argument here is based wholly on

the claim that the plaintiff's property was taken without compensation, a matter not even suggested before the case reached this court. This question was not presented to the *nisi prius* court; it was not presented to the supreme court of Iowa; it was not passed upon by that court; it is not even referred to in its opinion.

There is no decision of the state court on this question which it is possible for this court to review in this case.

II.

The failure on the part of the plaintiff in error to tender any part of the assessment constituted a complete defense and rendered the determination of any federal question unnecessary.

The allegations of paragraph five of the plaintiff's petition (record, page 5) are that the assessment against each lot was in excess of the value of such lot, and that the aggregate assessment exceeded the reasonable market value of all of the lots.

The plaintiff in error does not set out in what amount he claims the assessment exceeded the value of the lots. If this excess were in his opinion one dollar or one cent it would support the averments of his bill.

By section 479 of the code of 1873 of Iowa, it is provided that where the court is satisfied that work has been done or materials furnished which would form the proper basis of an assessment, "a recovery shall be permitted or a charge enforced to the extent of the proper proportion of the value of the work or materials which would be chargeable on such lot or lands notwithstanding any informality, irregularity or defect in any such municipal corporation or any of its officers." By the same section the court is authorized to make such order as to the costs as is deemed proper, and to render a personal judgment. This section is set out in full in the appendix to this brief. In the case of

Burlington vs. Quick, 47 Iowa, 222, 228,

the supreme court of Iowa construing this section held that if the improvement is such as the city is authorized to make, all errors and irregularities should be discarded and recovery permitted for the proper proportion of the value of the work.

The plaintiff in error does not deny the power to enforce liability up to the value of the lots, and under the statute to which we have just referred no defect in the proceedings could have entirely relieved the plaintiff in error from liability. Notwithstanding these facts the plaintiff in error brought his suit in the court below asking that the certificates be cancelled, the tax annulled, and the county officers enjoined from enforcing it, without alleging that he has paid or offered to pay any part of the tax; nor does he tender any part of it. It is the settled law of this court that under such circumstances the plaintiff in error is not entitled to relief in a court of equity. In the

State Railroad Tax Cases, 92 U. S., 575, 616,

this court goes further and avers that an actual payment of the amount due is necessary before relief can be had in a court of equity. It says (page 616):

Before complainants seek the aid of the court to be relieved of the excessive tax, they should pay what is due. Before they ask equitable relief, they should do that justice which is necessary to enable the court to hear them. * * * * It is not sufficient to say in the bill, that they are ready and willing to pay whatever may be found due. They must first pay what is conceded to be due, or what can be seen to be due on the face of the bill, or be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted. The state is not to be thus tied up as to that of which there is no contest, by lumping it with that which is really contested. If the proper officer refuses to receive a part of the tax it must be tendered, and tendered without the condition annexed of a receipt in full for all the taxes assessed.

We are satisfied that an observance of this principle would prevent the larger part of the suits for restraining collection of taxes which now come into the courts. We lay it down

with unanimity, as a rule to govern the courts of the United States in their action in such cases. Cooley on Tax, 537; Palmer v. Napoleon, 16 Mich., 176; Hersey v. Supervisors, 16 Wis., 185; Roseberry v. Huff, 27 Ind., 12; Frazer v. Liebon, 16 Ohio St., 614; Parmely and Others v. The Railroad Companies, 3 Dill., 19.

The same rule is announced in the

National Bank vs. Kimball, 103 U. S., 732,

and again in

Albuquerque Bank vs. Perea, 147 U. S., 87.

In the case last mentioned it will be noticed that a demurrer to the bills was sustained and the bills dismissed, and that the appeal was from the ruling on this demurrer. In the case at bar the parties stipulated that the motion should be treated as a demurrer. The tenth ground of division one of the motion (record, bottom of page 26) is as follows:

That said improvement having been completed and plaintiff having failed to pay or offer to pay any part of the cost thereof, he cannot in this proceeding be heard to complain thereof.

This shows that this question was unequivocally made at the very outset of this controversy in the trial court.

The rule announced in the decisions of this court to which we have just referred is the rule which has been adopted by the supreme court of Iowa. See

Grimmell vs. City of Des Moines, 57 Iowa, 144-149,

from which we quote as follows:

But if the plaintiff has just ground of complaint because of the inequality of the assessment she has not put herself in position to claim relief in equity. She does not deny that she is justly liable under the ordinance, if it be valid, for a

portion, at least, of the assessment. She cannot defeat the whole assessment, and chancery will not hear her complaint unless she pay or offer to pay the part of the tax justly due. Morrison et al. vs. Hershire, 32 Iowa, 271.

See also to the same effect,

Morrison vs. Hershire, 32 Iowa, 271.

This proposition, which is entirely independent of any federal question, is in itself sufficient to support the conclusion which was reached by the court below, and it was not necessary for the determination of this case to decide any federal question.

It is true that in the opinion of the supreme court of Iowa no reference is made to this question, although the question was argued in that court. The question, however, is in the case and is sufficient to support the ruling of the supreme court of the state of Iowa without any reference to any federal question whatever, and on account of this question the determination of the case must have been adverse to the plaintiff in error whatever conclusion was reached upon the federal question. Under these circumstances it is entirely clear that this court has no jurisdiction. See

Dibble vs. Bellingham Bay Land Co., 163 U. S., 63.

Eustis vs. Bolles, 150 U. S., 361.

Winter vs. Montgomery, 156 U. S., 385.

Hammond vs. Johnston, 142 U. S., 73.

Hammond vs. Gordon, 150 U. S., 633.

III.

The tax in controversy was not a taking of private property for a public purpose without compensation.

The argument of counsel is that the averments of the bill filed by the plaintiff in error show that the benefits derived by his property from this assessment are less than the

amount of the assessment, and that therefore to compel him to pay this tax is to take his property without due process of law.

In connection with this matter several subordinate questions suggest themselves—

(a) **The power exercised was the power of taxation and not that of eminent domain.**

The fundamental error in the argument of counsel for the plaintiff in error is that they have confused the power of eminent domain with that of taxation. They rely upon the case of the

Chicago, Burlington & Quincy R. R. Co. vs. City of Chicago, 166 U. S., 226,

as conclusive in their favor, and with reference to it say (brief, page 27):

"We apprehend, however, that the question as to whether the taking of private property for public use without just compensation is a denial of due process of law is definitely settled by the decision of this court in" that case.

In the case just referred to the question was whether a taking of the right of way of a railroad company by a city for street purposes without compensation would constitute a denial of due process of law, and this question was decided in the affirmative upon the ground that this was an exercise of the right of eminent domain. So far, if at all, as the other case relied upon by counsel,

Scott vs. City of Toledo, 36 Fed. Rep., 385,

supports the contention of the plaintiff in error it conflicts with the decisions of this court in

Bauman vs. Ross, 167 U. S., 589,

and the earlier cases to which we shall later refer at length.

It is conclusively settled by the authorities that special assessments for paving or other local improvement are an exercise, not of the power of eminent domain, but of the power of taxation, and that the necessity for direct compensation which exists where the power of eminent domain is invoked does not exist here. The distinction is clearly pointed out by this court in the

County of Mobile vs. Kimball, 102 U. S., 691-703.

There a tax was levied for the improvement of Mobile harbor. The entire expense was imposed upon the county of Mobile. Objection was made that it constituted a taking of property without just compensation, and was consequently in violation of the constitution; it being contended that the benefits to ensue would accrue to the state at large, while the entire expense was imposed upon a single county, the argument being exactly similar to that made in the case at bar. Mr. Justice Field, who wrote the opinion, distinguishes the right of taxation from that of eminent domain, saying:

The expenses of the work were of course to be ultimately defrayed by taxation upon the property and people of the county. But neither is taxation for a public purpose, however great, the taking of private property for public use, in the sense of the constitution. Taxation only exacts a contribution from individuals of the state or of a particular district, for the support of the government, or to meet some public expenditure authorized by it, for which they receive compensation in the protection which government affords, or in the benefits of the special expenditure. But when private property is taken for public use, the owner receives full compensation. The taking differs from a sale by him only in that the transfer of title may be compelled, and the amount of compensation be determined by a jury or officers of the government appointed for that purpose. In the one case, the party bears only a share of the public burdens; in the other, he exchanges his property for its equivalent in money. The two things are essentially different.

The objection to the act here raised is different from that taken in the state court. Here the objection urged is that it fastens upon one county the expense of an improvement for the benefit of the whole state. Assuming this to be so, it is not an objection which destroys its validity. When any public work is authorized, it rests with the legislature, unless restrained by constitutional provisions, to determine in what manner the means to defray its cost shall be raised. It may apportion the burden ratably among all the counties, or other particular subdivisions of the state, or lay the greater share or the whole upon that county or portion of the state specially and immediately benefited by the expenditure.

It may be that the act in imposing upon the county of Mobile the entire burden of improving the river, bay, and harbor of Mobile is harsh and oppressive, and that it would have been more just to the people of the county if the legislature had apportioned the expense of the improvement, which was to benefit the whole state, among all its counties. But this court is not the harbor, in which the people of a city or county can find a refuge from ill-advised, unequal and oppressive state legislation. The judicial power of the federal government can only be invoked when some right under the constitution, laws, or treaty of the United States is invaded. In all other cases, the only remedy for the evils complained of rests with the people, and must be obtained through a change of their representatives. They must select agents who will correct the injurious legislation, so far as that is practicable, and be more mindful than their predecessors of the public interests.

This doctrine has been reaffirmed as to special assessments in the recent case of

Bauman vs. Ross, 167 U. S., 548-588,

in which this whole matter is exhaustively discussed by this court. In that case, referring to a section of an act of congress which authorized the assessment of damages on account of opening and establishing a street against the abutting property, this court says:

The provisions of this section are to be referred, not to the right of eminent domain, but to the right of taxation; and the

general principles applicable to this branch of the case have been affirmed by a series of decisions by this court.

The following decisions in addition to Mobile County vs. Kimball, *supra*, are cited by this court as supporting this proposition:

Davidson vs. New Orleans, 96 U. S., 97.

Hagar vs. Reclamation District, 111 U. S., 701.

Spencer vs. Merchant, 125 U. S., 345, 355, 356.

Walston vs. Nevin, 128 U. S., 578, 582.

Lent vs. Tillson, 140 U. S., 316, 328.

Illinois Central Railroad vs. Decatur, 147 U. S., 190, 198, 199.

Paulsen vs. Portland, 149 U. S., 30.

Willard vs. Presbury, 14 Wall., 676.

Mattingly vs. District of Columbia, 97 U. S., 687.

Shoemaker vs. United States, 147 U. S., 282, 286, 302.

In a very lucid opinion in

People vs. Brooklyn, 4 N. Y., 419-430,

which is particularly commended by this court in Bauman vs. Ross, the same conclusion is reached.

In a recent case in West Virginia,

City of Parkersburg vs. Tavenner, 26 S. E. Rep., 179,

the supreme court of that state says:

Local assessments for local improvements do not depend on the question of eminent domain or police regulations, but belong strictly to the taxing power, for they are merely a substitute for general taxation for the same public purposes, as being more uniform and equitable in their bearing on persons and property. Therefore all that is said in argument about the doctrine of eminent domain has no bearing on the case under discussion.

Many cases to the same effect are cited in

Cooley on Taxation, page 624,

where, referring to the contention that special assessments constitute a taking of property without compensation, the author says:

If special assessments are taxes, the compensation is conclusively presumed to be received by those who pay them. It is only on the assumption that they are laid in the exercise of the power of eminent domain that the objection could have any force whatever. But the distinction between the two cases is very clear. "Taxation exacts money or services from individuals as and for their respective shares of contribution to any public burden. Private property taken for any public use, by right of eminent domain, is taken, not as the owner's share of contribution to a public burden, but as so much beyond his share. Special compensation is therefore to be made in the latter case, because the government is a debtor for the property so taken; but not in the former, because the payment of taxes is a duty, and creates no obligation to repay otherwise than in the proper application of the tax. Taxation operates upon a community or upon a class of persons in a community, and by some rule of apportionment. The exercise of the right of eminent domain operates upon an individual, and without reference to the amount or value exacted from any other individual or class of individuals." Attention to the distinction here pointed out will make clear the fact that special assessments are not an exercise of the eminent domain.

Chief Justice Corliss in an opinion recently delivered by the supreme court of North Dakota exhaustively considers this question, and very clearly demonstrates that the confusion among the special assessment cases is due to a failure to accurately discriminate between taxation and eminent domain. This opinion is perhaps the best of the recent decisions of the state courts on this subject. See

Rolph vs. City of Fargo, 76 N. W. Rep., 242.

(b) **The amount of benefits is not an open question.**

Inasmuch as usually special assessments are not levied upon the community at large but upon the portion of it embraced within limited districts, it is substantially correct to say that in all special assessments two questions with reference to benefits must be determined at some stage of the proceeding; the class benefited must be determined and the method of apportioning the burden among the members of this class. The class should include those specially benefited, and the assessment should be apportioned among the individuals in proportion to the benefit received by each one.

The determination of these questions lies with the legislature of the state, unless delegated to subordinate bodies which the legislature may charge with this duty; and when these facts have been determined by the legislature or by the subordinate body charged with this function this determination is conclusive. This is true even though the tribunal making this determination be fallible and commit errors which in particular cases work hardships.

These questions have been often discussed and are conclusively determined by the decisions of this court. A case strongly in point is

Spencer vs. Merchant, 125 U. S., 345.

This was a case of street assessment and the question was made squarely whether the parties interested had been deprived of their property without due process of law in violation of the fourteenth amendment to the constitution of the United States. In this case it is clearly held that the legislature has the power to determine what property is benefited and the amount of the benefit, and that this determination by the legislature is conclusive. It covers these questions so completely that we quote from it at length. (Page 352.)

The substance of the former decisions, and the grounds of the judgment sought to be reviewed, can hardly be more compactly or forcibly stated than they have been by Judge

Finch in delivering the opinion of the court of appeals, as follows:

"The act of 1881 determines absolutely and conclusively the amount of tax to be raised, and the property to be assessed and upon which it is to be apportioned. Each of these things was within the power of the legislature, whose action cannot be reviewed in the courts upon the ground that it acted unjustly or without appropriate and adequate reason. *Litchfield v. Vernon*, 41 N. Y., 123, 141; *People v. Brooklyn*, 4 N. Y., 427; *People v. Flagg*, 46 N. Y., 405; *Horn v. New Lots*, 83 N. Y., 100; *Cooley on Taxation*, 450. The legislature may commit the ascertainment of the sum to be raised and of the benefited district to commissioners, but it is not bound to do so, and may settle both questions for itself; and when it does so, its action is necessarily conclusive and beyond review. Here an improvement has been ordered and made, the expense of which might justly have been imposed upon adjacent property benefited by the change. By the act of 1881, the legislature imposes the unpaid portion of the cost and expense, with the interest thereon, upon that portion of the property benefited which has thus far borne none of the burden. In so doing, it necessarily determines two things, viz.: the amount to be realized, and the property specially benefited by the expenditure of that amount. The lands might have been benefited by the improvement, and so the legislative determination that they were, and to what amount or proportion of the cost, even if it may have been mistakenly unjust, is not open to our review. The question of special benefit and the property to which it extends is of necessity a question of fact, and when the legislature determines it in a case within its general power, its decision of course must be final. We can see in the determination reached possible sources of error and perhaps even of injustice, but we are not at liberty to say that the tax on the property covered by the law of 1881 was imposed without reference to special benefits. The legislature practically determined that the lands described in that act were peculiarly benefited by the improvement to a certain specified amount which constituted a just proportion of the whole cost and expense; and while it may be that the process by which the result was reached was not the best attainable, and some other might have been more accurate and just, we cannot for that reason question an enactment within the general legislative power. That power of taxation is unlimited, except that it must be exercised for public purposes. *Weismer v. Douglas*, 64 N. Y., 91. Certainly if the acts of

1869 and 1870 had never been passed, but the improvement of Atlantic avenue had been ordered, the legislature might have imposed one part or proportion of the cost upon one designated district and the balance upon another. Practically just that was done in this case. In *Re Van Antwerp*, 56 N. Y., 261, an assessment for a street improvement had been declared void by reason of failure to procure necessary consents of property-owners. The legislature made a reassessment, imposing two-thirds of the expense upon a benefited district and one-third upon the city at large. The act was held valid as a new assessment and not an effort to validate a void one.

"These views furnish also an answer to the objection that the only hearing given to the land owner relates to the apportionment of the fixed amount among the lots assessed, and none is given as to the aggregate to be collected. No hearing would open the discretion of the legislature, or be of any avail to review or change it. A hearing is given by the act as to the apportionment among the land-owners, which furnishes to them an opportunity to raise all pertinent and available questions, and dispute their liability, or its amount and extent. The precise wrong of which complaint is made appears to be that the land-owners now assessed never had opportunity to be heard as to the original apportionment, and find themselves now practically bound by it as between their lots and those of the owners who paid. But that objection becomes a criticism upon the action of the legislature and the process by which it determined the amount to be raised and the property to be assessed. Unless by special permission, that is a hearing never granted in the process of taxation. The legislature determines expenditures and amounts to be raised for their payment, the whole discussion and all questions of prudence and propriety and justice being confined to its jurisdiction. It may err but the court cannot review its discretion. In this case it kept within its power when it fixed, first, the amount to be raised to discharge the improvement debt incurred by its discretion; and, second, when it designated the lots and property, which in its judgment, by reason of special benefits, should bear the burden; and having the power, we cannot criticise the reasons or manner of its action. The land-owners were given a hearing, and so there was no constitutional objection in that respect. Nor was that hearing illusory. It opened to the land-owner an opportunity to assail the constitutional validity of the act under which alone an apportionment could be made, and that objection failing, it opened the

only other possible questions, of the mode and amounts of the apportionment itself. We think the act was constitutional. 100 N. Y., 587-589."

The general principles upon which that judgment rests, have been affirmed by the decisions of this court.

The power to tax belongs exclusively to the legislative branch of the government. *United States v. New Orleans*, 98 U. S., 381; *Meriwether v. Garrett*, 102 U. S., 472. In the words of Chief Justice Chase, condensing what had been said long before by Chief Justice Marshall, "The judicial department cannot prescribe to the legislative department limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons; but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected." *Veazie Bank v. Fenno*, 8 Wall., 533, 548; *McCulloch v. Maryland*, 4 Wheat., 316, 428; *Providence Bank v. Billings*, 4 Pet., 514, 563. See also *Kirtland v. Hotchkiss*, 100 U. S., 491, 497. Whether the estimate of the value of the land for the purpose of taxation exceeds its true value, this court on writ of error to a state court cannot inquire. *Kelley v. Pittsburgh*, 104 U. S., 78, 80.

The legislature in the exercise of its power of taxation, has the right to direct the whole or a part of the expense of a public improvement, such as the laying out, grading or repairing of a street, to be assessed upon the owners of lands benefited thereby; and the determination of the territorial district which should be taxed for a local improvement is within the province of legislative discretion. *Willard v. Presbury*, 14 Wall., 676; *Davidson v. New Orleans*, 96 U. S., 97; *Mobile County v. Kimball*, 102 U. S., 691, 703, 704; *Hagar v. Reclamation District*, 111 U. S., 701. If the legislature provides for notice to and hearing of each proprietor, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law. *McMillen v. Anderson*, 95 U. S., 37; *Davidson v. New Orleans*, and *Hagar v. Reclamation District*, above cited.

In *Davidson v. New Orleans*, it was held that if the work was one which the state had the authority to do, and to pay for by assessments on the property benefited, objections that the sum raised was exorbitant, and that part of the property assessed was not benefited, presented no question under the fourteenth amendment to the constitution upon which this court could review the decision of the state court. 96 U. S., 100, 106.

Proceeding in the Merchant case the court says:

But the legislature has the power to determine, by the statute imposing the tax, what lands, which might be benefited by the improvement, are in fact benefited; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are benefited or not, but only upon the validity of the assessment, and its apportionment among the different parcels of the class which the legislature has conclusively determined to be benefited.

It says further:

But in the statute of 1881 the legislature itself determined what lands were benefited and should be assessed. By this statute the legislature, in substance and effect, assumed that all the lands within the district defined in the statute of 1869 were benefited in a sum equal to the amount of the original assessment, the expense of levying it, and interest thereon; and determined that the lots upon which no part of that assessment had been paid, and which had therefore as yet borne no share of the burden, were benefited to the extent of a certain portion of this sum. That these lots as a whole had been benefited to this extent was conclusively settled by the legislature. The statute of 1881 afforded to the owners notice and hearing upon the question of the equitable apportionment among them of the sum directed to be levied upon all of them, and thus enabled them to contest the constitutionality of the statute; and that was all the notice and hearing to which they were entitled.

This case covers both the power of the legislature to determine, in the first instance, the particular class benefited, and thus the amount of the aggregate benefit to that class, and also to determine the manner in which the assessment shall be apportioned, thus fixing the amount of the individual benefit; and shows clearly that this determination is conclusive. This same doctrine is reaffirmed in

and the Merchant case is cited with approval in support of all of these propositions in the case of

Bauman vs. Ross, 167 U. S., 589-590.

We call attention also to

Elliott on Roads & Streets, page 393,

and to the many cases cited by him. The author says:

The weight of authority, however, is overwhelmingly in favor of the right of the legislature to determine what property shall be assessed and how the apportionment shall be made. According to the rule generally laid down, no question can be litigated involving the decision of the legislature, or the local authorities upon whom the power to decide has been conferred, concerning the apportionment of the expense; all that is open to investigation is the mode of procedure and the manner of performing the work.

Cooley lays down the same rule. See

Cooley's Constitutional Limitations, Sixth Edition,
page 599.

This rule is nowhere questioned, and it is unnecessary to cite further authorities.

(c) The tax in question is not vulnerable to the objections urged against it.

Applying the propositions to which we have just referred, the conclusion must be reached that the objections which the plaintiff in error urges against this tax are not well taken. In the first place the authorities which he cites in support of the doctrine of eminent domain are not in point because the power exercised here is the power of taxation; it is not the right of eminent domain. It is unnecessary to elaborate upon this proposition.

Nor are the premises from which he deduces his conclusion that he has been deprived of property without compen-

sation sound. The argument of counsel is that the benefit received is the limit of the burden that may be imposed; that the assessment certainly exceeds the benefit, because it exceeds what he offered to prove was the reasonable market value of the property at the time it was laid, and that therefore to compel him to pay this excess is to take his property without benefit, consequently without compensation and without due process of law. This argument, however, absolutely ignores the fact that the legislature has determined what the amount of the benefit is and ignores the conclusiveness of this determination. By the statute in question, section ten, (see appendix hereto) it is expressly provided that the total cost shall be charged to the abutting property.

Here is an express determination by the legislature that the benefits equal this cost. Following the case of *Spencer vs. Merchant, supra*, it must be held that in enacting this law the legislature of Iowa "necessarily determines two things, viz., the amount to be realized and the property specially benefited by the expenditure of that amount."

The court proceeds:

The lands might have been benefited by the improvement, and so the legislative determination that they were, and to what amount or proportion of the cost, even if it may have been mistakenly unjust, is not open to our review. The question of special benefit and the property to which it extends is of necessity a question of fact, and when the legislature determines it in a case within its general power, its decision must of course be final.

These extracts from the opinion of the supreme court of New York are approved by this court. Referring to the amount of the tax imposed by the legislature as compared with the benefits, this court says:

That these lots as a whole had been benefited to this extent was conclusively settled by the legislature. The statute of 1881 afforded to the owners notice and hearing upon the question of the equitable apportionment among them of the

sum directed to be levied upon all of them, and thus enabled them to contest the constitutionality of the statute, and that was all the notice and hearing to which they were entitled.

These propositions are reaffirmed in the later cases decided by this court in which *Spenceer vs. Merchant* is followed.

In the case at bar the amount of the benefits was not an open question. It was conclusively determined by the enactment of this statute, which decided that the entire cost should be included in the assessment. While this "may have been mistakenly unjust" as was undoubtedly the allowance of only one dollar to the Chicago, Burlington & Quincy Railroad Company as damages in the case of that company against the city of Chicago, still this matter having been determined by the proper tribunal and being within its power, the question is at rest and is no longer an open question. It, therefore, is evident that the plaintiff in error had not a right to litigate this question in the trial court, and that the trial court properly struck from his petition the averments from which he seeks to deduce this conclusion.

It is likewise manifest that the entire argument of the plaintiff in error in this court, which is founded upon the assumption that this question of benefits was not determined by the legislature but was an open question which he had a right to litigate in the trial court, is equally unsound. The record does not present a case where it is admitted that the amount of the benefits is less than the amount of the assessment. The record presents a case where the duly constituted authority had determined that the amount of the benefits is equal to the amount of the assessment, and where the plaintiff in error seeks to review the act of the legislature by an appeal to the courts.

As we have already seen this question was not presented to the trial court, nor was it presented to the supreme court of Iowa. It is safe to assume, however, that if it had been presented to either of these courts it would unhesitating-

ly have followed the unbroken line of authorities which announces the conclusion reached by this court, and would have said to the plaintiff in error that his argument must fall because the legislature having determined this matter no extrinsic evidence could be permitted to show that the determination of the legislature was wrong.

We submit that the same conclusion must be reached by this court, and that it having been within the power of the legislature of Iowa to determine this question, and it having been conclusively determined that the benefits here equal the entire cost of the assessment, the case cannot be argued or considered upon the theory that the plaintiff in error should have been permitted to treat this as an open question, to introduce proof upon it in the state court, and to there review the discretion of the legislature in the matter. Unless he had this right the state court did not err in striking from his petition the averments upon which he now relies in this connection. They were properly stricken out because the matter was at rest. Therefore the foundation of his entire argument in this court falls.

Id The legislature of the state had the power to impose this tax.

It is only incumbent upon us to show that the attack which is made by the plaintiff in error upon this tax is unfounded; we are not bound to show that the law in fact is a valid law, and not subject to objections which were not urged below, and are not urged here. We shall discuss this matter as briefly as practicable.

Turning to the law of which a copy is printed in the appendix to this brief, it appears, section 11, that when the work is done the board of public works of the city is required to have a plat prepared showing the separate lots of the ground and the names of all the owners and the amount assessed against each lot or piece of ground, and to give two weeks' notice in two newspapers of the city, and by posting

handbills in conspicuous places on the line of the work, of the time and place where for the period of twenty days thereafter the same may be seen for the correction of errors, and that it is only after the errors have been corrected that the assessment is completed.

The supreme court of Iowa has recognized the right to review the action of the board of public works, and the city, in passing on objections to the assessment by an action in certiorari, which on appeal may be taken to the supreme court of the state.

Polk vs. McCartney, 104 Iowa, 567.
Gilchrest vs. McCartney, 97 Iowa, 138.

Further than this

Coggeshall vs. City of Des Moines, 78 Iowa, 235.
Dittoe vs. Davenport, 74 Iowa, 66.
Muscatine vs. C. R. I. & P. R. Co., 79 Iowa, 645.
Farwell vs. Des Moines Brick Mfg. Co., 97 Iowa, 286.
Muscatine vs. C. R. I. & P. R. Co., 88 Iowa, 291.
McManus vs. Hornaday, 99 Iowa, 507.
Osburn vs. Lyons, 104 Iowa, 160.
Tuttle vs. Polk, 92 Iowa, 432.

sufficiently illustrate the fact that under the laws of Iowa not only is a hearing provided for, but also resort may be had to the courts to test the legality of the assessment. That the notice provided for in section 11 is sufficient to fill the requirements of due process of law cannot be questioned.
See

Davidson vs. New Orleans, 96 U. S., 97.
Hagar vs. Reclamation District, 111 U. S., 701.
Lent vs. Tillson, 140 U. S., 316.
Paulsen vs. Portland, 149 U. S., 30.

No claim is made in this court on this question. Many other authorities might be cited if it were necessary.

It must also be conceded that this tax was levied for a public purpose. No authority is necessary to support the proposition that taxation for the purpose of paving streets is for a public purpose.

It is also proper to note that it has been the policy of the state of Iowa for fifty years, substantially ever since its admission as a state, to impose personal liability to the full amount of the tax on account of special assessments. See in the appendix hereto.

Section 1068, Revision of 1860, re-enacting law of 1848.
Section 479 of the Code of 1873.

It thus appears that for many years it has been the settled law of Iowa that a personal liability may be imposed on account of a special assessment. This question was made in the case of

Farwell vs. Des Moines Brick Manufacturing Co., 97 Iowa, 286,

and was decided in favor of personal liability. No constitutional question was urged there; the case turned upon the construction of statutes of Iowa and the court held that under those statutes personal liability existed. The same conclusion was reached by the court in the present case. In the

City of Burlington vs. Quick, 47 Iowa, 222,

decided at the December term, 1877, of the supreme court of Iowa, the question was squarely made that personal liability was unconstitutional, and this was overruled. This is affirmed in

Sioux City vs. Independent School District of Sioux City, 55 Iowa, 150,

where the court says:

The statute makes the tax a personal charge against the owner, and a lien on the real estate, and it has been held this may be done. *Quick vs. Burlington*, 47 Iowa, 222.

The personal charge is a debt which may be enforced by a personal action against the owner.

The power of the legislature in the premises has not otherwise been questioned in Iowa. It therefore must be, in considering this matter, taken as the settled law in Iowa that a personal liability should be imposed for taxes of this character.

Another proposition is also settled law in Iowa. It is that special assessments as a species of taxation are supported by the general benefit to the community irrespective of the question of the benefit to the abutting property. In the present case the supreme court of Iowa says:

It is sufficient to say that it has been repeatedly held by this court that such improvements of streets is a public object which will support such an assessment regardless of the fact whether or not it is a benefit to the abutting property.

Warren vs. Henly, 31 Iowa, 31.

Morrison vs. Hershey, 32 Iowa, 271.

Gatch vs. City of Des Moines, 63 Iowa, 718; 18 N. W. Rep. 310.

City of Muscatine vs. Railway Company, 88 Iowa, 291; 55 N. W. Rep. 100.

We regard the law upon this question as settled in this state.

The case of *Warren vs. Henly*, cited above, is the leading case upon this question in Iowa. We therefore quote from it at considerable length, as follows:

Upon the question presented in this case, involving the constitutionality of the city charter, so far as it confers the power upon the city to assess the cost of paving streets upon the abutting lots, we have had no little difficulty in arriving at a conclusion satisfactory to all members of the court. The point has been considered by the different justices who have occupied this bench since the cause was submitted, and, while

there have been diverse views upon the question, a majority concurred in the line of argument and conclusion which I am about to announce. These views have the concurrence of the justices now constituting this bench, and, while some of them are willing to rest the conclusion arrived at upon a course of reasoning different from the one I present, they are satisfied with the results reached in the following discussion.

I am unable to support our conclusions upon this point on the reasoning of the authorities within my reach. My mind, however, is satisfied with the course of argument which I will briefly announce.

The power in question, in my opinion, is derived from the right of taxation, and not from the right of eminent domain, nor is it derived from the police authority of the city.

I know of no restrictions upon the power of taxation except these two:

1. Taxes must be for objects that are public in their nature. It is admitted on all hands that the paving of a street is a public object.

2. They must be uniform. By this I understand that they must not be imposed alone, nor unequally, upon particular individuals or classes. This rule, however, I understand is applicable generally to the *principle or plan* of taxation, and not to specific or particular taxes. It means that all individuals and all classes shall be uniformly taxed. It does not mean that certain particular taxes, as income taxes, licenses, specific taxes upon certain property used as instruments of profit, or articles of luxury, shall be prohibited. These are not uniform in one sense; that is, all do not pay them. They are and must be uniform in another sense; that is, all possessing particular incomes, exercising certain business, and owning the specified property, must be subject to the same tax. They are again not uniform in another sense, for under them the burden of taxation is not uniformly borne. *All* incomes may not be taxed; those of a certain amount may be exempt; licenses may not be imposed upon the exercise of *all* branches of business, and *all* articles of property used for profit or luxury may not be specifically taxed. The rule means that all individuals and all classes must contribute uniformly with like individuals and like classes to the burden of taxation. The manner of imposing this burden must, of necessity, be left to the discretion of the legislative branch of the government. That a tax or a system of taxation may not bear equally upon all, when weighed in the nicest balance of equity and justice, is no reason for holding that it conflicts

with the fundamental and essential rule under consideration. Such a result is inevitable from the nature of things, for it is practically impossible so to form a system of taxation that all will equally bear the burden imposed. We know from experience such to be the fact, and it is unnecessary to cite instances, or enter into an examination of various systems of taxation, in order to sustain this proposition.

In my opinion in the exercise of the power of taxation, the special participation in the benefits of a particular tax, on the part of the tax payer, has nothing to do with the right to impose the tax. A special tax may go into the treasury for the general purpose of the government levying it. The identical revenue thus collected may be used for purposes, from which the tax payers of whom it was received derive directly no benefit, and others, paying not one cent of the special tax, are solely benefited in its disbursement. No objection, therefore, can be raised to a specific tax based upon the application of the money realized therefrom. It is true, however, that taxation is better supported according to our ideas of equity and justice, when the proceeds thereof are appropriated to the direct benefit of the tax payer.

In the case before us the city may, and it is required to, pave the streets. To do this it may levy taxes. All the streets, however, may not need paving; and it would be burdensome and perhaps ruinous to pave all of them. Some particular streets ought this year to be paved; as the city and its business increases, others ought to be paved next year, and so on. Now it is not denied that the paving of each street, as it is required, is a public benefit. That it is an equal benefit to each citizen cannot be claimed. But that it is such a public purpose that each citizen may be taxed therefor, cannot be doubted. If they are paved by a general tax, the burdens and benefits will not be equally borne and received. If each street is paved by a special tax on the abutting lots, it may also be admitted that the burdens and benefits are not equally distributed. The same difficulty exists in each case. When we contemplate the case of a single street, or a single block, the manner of specific taxation upon abutting lots may appear to impose more unequally the burden in relation to the benefits, but when we take in view the fact that *all* the streets of the city, so far as the public good demands, are to be paved in the same way, we see at once that the burdens are more equally distributed. The lots on one street may not be taxed this year, but they will be next, or when the public good requires it. In due time they must bear their

proper burden. If the public good never requires it, all that can be said is, that the tax payer is relieved, because the public interest does not demand the expenditure of revenue realized from such tax. In this view the system is equitable and just. I do not claim that this is perfectly so; I know that it is not. But, as I have before pointed out, no system in my opinion is or can be. But it approximates a just distribution of the burden, and is as near thereto as the system of general taxation for such public improvements can attain.

* * * * *

I find no support for my conclusion upon the ground that the tax may be sustained because the property is benefited by the improvement. The property holder has a right to determine whether he will, or will not, enjoy certain benefits. The city cannot determine that question for him, and tax him in order to bestow them upon him. I base my conclusion upon the simple ground that the object of the taxation—the improvement of the streets—is a public object, which will support it; that the system of taxing the abutting lots, in its practical application, secures such a just and fair distribution of the burden as to be within the rule requiring uniformity of taxation.

This rule is reaffirmed in the later cases. It will be noted that in this case the assessment was assailed as in contravention of the constitution of Iowa, but that the supreme court of the state overruled this contention.

Another matter is pertinent in this connection. Taxes are generally a personal liability in Iowa. This is manifest from the reasoning in the leading case,

City of Dubuque vs. Illinois Central R. R. Co., 39 Iowa,
56, 60.

from which we quote as follows:

The first question, which we now proceed to consider, involves the constitutionality of the statute, by the force of which it is claimed, the taxes sued for are discharged, and are therefore not collectible.

No question is made as to the legality of the assessment and levy of the taxes in question. The lawful power and right of the city to impose them upon the property of the

defendant was determined in the Dunlieth & Dubuque Bridge Co. vs. The City of Dubuque, *supra*. The sole question, then, to be determined in this branch of the case is this: Can the legislature discharge the obligation of the defendant to pay the tax, as it is attempted to be done by the law in question?

It is first necessary to inquire into the nature of the taxes for which suit is brought. They were levied under the authority of law, and are not different in character, as to the obligation resting upon the tax payer to discharge them, from any other legal assessments. As in the case of other taxes, there is a duty resting upon the defendant to pay them, and there is a correlative right of the city to receive and collect them. The law creates this duty and this right. We have here the case of an obligation whereby the defendant is bound to pay the money in suit; the obligation is raised by the law which implies an undertaking of defendant to pay the taxes. The case fills the definition of a contract, a term which, in its more extensive sense, includes every agreement, obligation, or legal tie, whereby one party becomes bound, expressly or impliedly, to another to pay a sum of money, or to do or omit to do a certain act. Bouvier's Dict., Tit. Contract; Chitty's Contracts, p. 2; 3 Blackstone's Com., 158.

By the lawful levy of the taxes in suit, which were assessed against the defendant, and not *in rem*, defendant became personally bound for the payment. This obligation created a debt in the sense of the term when applied to a liability for the payment of money.

It is especially important to bear in mind that the total amount of this tax does not exceed the cost of the improvement; consequently unless this court denies the power of the state of Iowa to make this improvement it must concede the power of the state of Iowa to collect this money, and it can only do this by means of a tax. The legislature of Iowa has determined conclusively that the owners of property abutting upon these premises are benefited to the extent of this tax, and in the exercise of its discretion has seen fit to impose this tax upon them.

It has been repeatedly decided by this court and is the established rule fixed by the unbroken current of authority

that the legislature has the right to determine whether or no the tax shall be laid upon a class and to determine what persons shall constitute that class. This is the end of argument upon this proposition. The constitution of the United States does not limit the power of the states to determine the class upon whom taxes shall be laid. This is all that remains of the contention of the plaintiff in error. Since paving is a legitimate public burden, the expense incident to it not only may be but must be met by taxation, for the public has no other source of revenue; and whether this burden shall be imposed upon the owners of the property specially benefited, or distributed over the public in general, is a matter that rests entirely in the discretion of the legislature. It is wholly outside of the scope of the federal constitution. This has been often decided by this court. The leading case upon the question of special assessments in this court is

Davison vs. New Orleans, 96 U. S., 97.

where this court says, referring to due process of law:

As contributing, to some extent, to this mode of determining what class of cases do not fall within its provision, we lay down the following proposition, as applicable to the case before us:

That whenever by the laws of a state, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.

It was urged there that there was no benefit, and in this connection the court says:

It is also said that part of the property of plaintiff which

was assessed is not benefited by the improvement. This is a matter of detail with which this court cannot interfere, if it were clearly so; but it is hard to fix a limit within these two parishes where property would not be benefited by the removal of the swamps and marshes which are within their bounds.

It was also urged there that there was no power to render a personal judgment. This proposition again was denied, this court saying :

And lastly, and most strongly, it is urged that the court rendered a personal judgment against the owner for the amount of the tax, while it also made it a charge upon the land. It is urged with force, and some highly respectable authorities are cited to support the proposition, that while for such improvements as this, a part, or even the whole of a man's property connected with the improvement may be taken, no personal liability can be imposed on him in regard to it. If this were a proposition coming before us sitting as a state court, or perhaps, in a circuit court of the United States, we might be called upon to decide it; but we are unable to see that any of the provisions of the federal constitution authorizes us to reverse the judgment of a state court on that question. It is not one which is involved in the phrase 'due process of law,' and none other is called to our attention in the present case.

This case has been cited with approval by this court in perhaps every case of a like character that has since been determined by it. In

Mattingly vs. District of Columbia, 97 U. S., 687.

this court clearly recognizes the power of the legislature to authorize such assessments and to apportion them in its discretion. We quote from page 692:

It may be that the burden laid upon the property of the complainants is onerous. Special assessments for special road or street improvements very often are oppressive, but that the legislative power may authorize them, and may direct them to be made in proportion to the frontage, area, or market

value of the adjoining property, at its discretion, is under the decision no longer an open question.

In Willard vs. Presbury, 14 Wall., 676-680, this court summarily disposes of the claim that it was not within the power of congress to charge the cost of repaving or repairing streets upon the abutting property, instead of generally upon the city, saying that this power cannot well be denied.

In County of Mobile vs. Kimball, 102 U. S., 691, the question was whether it was within the power of the state by taxation to impose upon a single county the expense of improving Mobile harbor, amounting to about a million dollars, where the benefit was not exclusive in the county but would be shared by the entire state. We have already referred to this case upon the proposition that the power exercised is that of taxation and not that of eminent domain. Referring to the objection just suggested this court in that case says :

When any public work is authorized, it rests with the legislature, unless restrained by constitutional provisions, to determine in what manner the means to defray its cost shall be raised. It may apportion the burden ratably among all the counties, or other particular subdivisions of the state, or lay the greater share or the whole upon that county or portion of the state specially and immediately benefited by the expenditure.

It may be that the act in imposing upon the county of Mobile the entire burden of improving the river, bay and harbor of Mobile is harsh and oppressive, and that it would have been more just to the people of the county if the legislature had apportioned the expenses of the improvement, which was to benefit the whole state, among all its counties. But this court is not the harbor, in which the people of a city or county can find refuge from ill-advised, unequal, and oppressive state legislation. The judicial power of federal government can only be invoked when some right under the constitution, laws, or treaties of the United States is invaded. In all other cases the only remedy for the evils complained of rests with the people, and must be obtained through a change of their representatives. They must select agents who will correct

the injurious legislation, so far as that is practicable, and be more mindful than their predecessors of the public interests.

In Hagar vs. Reclamanation District, 111 U. S., 701-705,

this court reaffirmes this doctrine. We quote as follows:

In some states the reclamation is made by building levees on the banks of streams which are subject to overflow; in other states by ditches to carry off the surplus water. Levees on embankments are necessary to protect lands on the lower Mississippi against annual inundations. The expense of such works may be charged against parties specially benefited, and be made a lien upon their property. All that is required, in such cases is that the charges shall be apportioned in some just and reasonable mode, according to the benefit received. Absolute equality in imposing them may not be reached; only an approximation to it may be attainable. If no direct and invidious indiscrimination in favor of certain persons to the prejudice of others be made, it is not a valid objection to the mode pursued that, to some extent, inequalities may arise. It may possibly be that in some portions of the coun'ry there are overflowed lands of so large an extent that the expense of their reclamation should properly be borne by the state. But this is a matter of purely legislative discretion. Whenever a local improvement is authorized, it is for the legislature to prescribe the way in which the means to meet its cost shall be raised, whether by general taxation, or by laying the burden upon the district specially benefited by the expenditure.

In Spencer vs. Merchant, 125 U. S., 345, from which we have heretofore quoted at length, the right of the legislature to direct that the entire expense of a public improvement of this character shall be assessed upon the owners of lands benefited thereby, is expressly recognized. This court says:

The legislature in the exercise of its power of taxation has the right to direct the whole or a part of the expense of a public improvement, such as the laying out, grading or repairing of a street, to be assessed upon the owners of lands benefited thereby; and the determination of the territorial district which should be taxed for a local improvement is within the province of legislative discretion.

Walston vs. Nevin, 128 U. S., 578, is a case from Kentucky involving assessments made under a statute which provided that street improvement should "be made at the exclusive costs of the owners of lots in each fourth of a square" and be apportioned according to area. In that case this court held that the Kentucky statute did not authorize the taking of property without due process of law. This court affirmed the case upon motion, quoting from Davidson vs. New Orleans *supra*, with approval, and reaffirming the power of the state to determine the taxing district and the manner of appointment.

In Lent vs. Tillson, 140 U. S., 316, 328, we have another special assessment case. Here again the cases to which we have referred are cited with approval and are followed, the extracts which we have just made from Spencer vs. Merchant being quoted and confirmed.

In Fallbrook Irrigation District vs. Bradley, 164 U. S., 112, this court says, referring to the fourteenth amendment:

It was never intended that the court should, as the effect of the amendment, be transformed into a court of appeal where all decisions of state courts involving merely questions of general justice and equitable considerations in the taking of property should be submitted to this court for its determination. The final jurisdiction of the courts of the states would thereby be enormously reduced and a corresponding increase in the jurisdiction of this court would result, and it would be a great misfortune in each case.

In that case this court expressly affirms Davidson vs. New Orleans, saying:

We reiterate the statement made in Davidson vs. New Orleans, *supra*, that "whenever by the laws of the state or by state authority a tax, assessment, servitude or other burden is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed in the ordin-

ary courts of justice, with such notice to the person or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to the other objections."

Referring further to the matter of benefit this court expressly reaffirms the statement made by Justice Miller in *Davidson vs. New Orleans* upon that proposition.

In the case of *Bauman vs. Ross*, 167 U. S., 548, these principles have been again announced by this court. The whole matter is there exhaustively discussed, and the right of the legislature to impose the tax, to conclusively determine the amount of the benefits, and to fix the class upon whom the tax is to be levied is unequivocally recognized. In this case also *Davidson vs. New Orleans* is cited with approval.

These authorities are conclusive upon the question under consideration. There can be no question whatever about the power of the legislature of the state of Iowa to impose this tax. It had the right to levy a tax in order to pave this street, which must be conceded to be a tax for a public purpose. It not only had the right to raise the entire fund necessary for this purpose by taxation, but of necessity was compelled to so raise it, because taxation is the only source of revenue which the state had. It had the power to determine, within its discretion, the class of the people upon whom this tax should be levied, and having determined this its discretion cannot be reviewed by the courts.

If the legislature of Iowa had the right to impose this tax the question of personal liability is entirely immaterial so far as the federal constitution is concerned. This was expressly decided in *Davidson vs. New Orleans*, *supra*. Indeed it is immaterial from any standpoint. Whether a tax shall be made a personal charge or not in the absence of restrictions in the state constitutions lies in the discretion of the legislature. Whether a lien shall be imposed on account of a tax is purely a matter of legislative discretion. These

are mere matters of detail going to the enforcement of the collection of the tax that is imposed. So far as the federal constitution is concerned no state is bound to make any tax lien. This is the custom simply because to do so is a necessity to collection from a practical standpoint. So far as the question of power is concerned the state might declare that all taxes should be personal obligations and that none of them should be liens upon any property.

There might have been some difficulty in enforcing this personal liability had not Dewey voluntarily invoked the jurisdiction of the Iowa courts in this suit which resulted in upholding instead of cancelling the tax. Since the plaintiff in error however makes no question here as to the matter of notice, but bases his entire contention on the proposition that the benefits exceed the burden and that therefore his property in excess of the value of the lots is taken without due process of law, probably even this mere reference to these matters is unnecessary.

Before leaving this question we desire to briefly refer to one further matter. It will be remembered that it has been the policy of the state of Iowa practically ever since its admission to impose a personal liability for paving assessments. See the appendix hereto under the head "prior statutes." It has also, as is shown by the authorities we have just cited, for a long time been the settled law in this state that these assessments may be supported by the general benefit to the public without reference to the benefit which may accrue to the owner of the abutting property. It appears from the complainant's bill (record, page 1) that he acquired the title to this property in the year 1888, long after both of the doctrines above referred to had become firmly established as a part of the law of the state of Iowa. He cannot now be heard to claim that the continued enforcement as the law of that state of what has been a part of its law practically ever since its organization involves any lack of due process of law. What he complains of has always been the established

rule in Iowa. It therefore cannot be claimed that there has been any departure from the established principles which constitute due process of law. In this connection we call attention to

Eldridge vs. Trezenant, 160 U. S., 452,

where this court holds that to impose a servitude upon property owned in Louisiana by a non-resident of that state without compensating him therefore does not deprive him of his property without due process of law because by the established law in Louisiana the state was entitled to that servitude.

In closing this branch of our argument we again call attention to

Rolph vs. City of Fargo, 76 N. W. Rep., 242,

which will be found in point upon many of the general propositions that are here involved.

IV.

The alleged invalidity of the annexation law.

In connection with this matter the constitution of the United States is not mentioned in the record until we reach the argument of counsel for the plaintiff in error in this court. By the amendment to his bill the plaintiff in error in the trial court pleaded that what is commonly known as the annexation law, viz.: Chapter one, Acts of the XXIII General Assembly of Iowa, was in contravention of the provision of the constitution of Iowa which requires that all laws, with certain exceptions, shall be general in their application. Founded on this claim was the argument that since the territory where the work in question was done was within the annexed portion of the city, this territory did not legally constitute a part of the city, and that therefore the city had no jurisdiction over it, so that

the contract for the doing of this work and all subsequent proceedings were beyond its jurisdiction and void.

At the time that the present suit was brought there was pending in the state courts an action in *quo warranto* entitled State *ex rel.* West vs. City of Des Moines which directly challenged the validity of the corporate organization of the enlarged city under the provisions of the said chapter one. This *quo warranto* case is reported in the 96th Iowa, page 521, and also 65 N. W. Rep., 818. In that case the supreme court of Iowa decided that while the act was vulnerable to the constitutional objection which we have suggested, still the corporate organization under it was valid by reason of long acquiescence. The case of State *ex rel.* vs. City of Des Moines involved the validity of the municipal organization of the city of Des Moines at the time that the contract in question in this suit was let. It was decided by the supreme court of Iowa that this municipal organization was valid. While that suit was pending and before it was decided by the supreme court the appeal was taken in this suit to the supreme court of Iowa, and error was assigned upon this question in the following language: (See transcript page 32).

Third: That the alleged annexation to the city of Des Moines of the territory which included the lots of plaintiff, under chapter 1, Acts Twenty-third General Assembly (1890) was illegal and void, said statute being a local and special law and in contravention of the constitution of Iowa, as alleged in paragraphs 7 and 8 of plaintiff's petition; and said city of Des Moines had no jurisdiction to improve said street or to levy the special assessment in question, for that reason on plaintiff's said lots.

Before this case was submitted to the supreme court of Iowa, however, the case of State *ex rel.* West had been decided. When counsel for Dewey filed their printed argument in the supreme court of Iowa they expressly waived all questions growing out of this matter of annexation. Inasmuch as the argument was not brought to this court

under the writ of error as a part of the record in the supreme court of Iowa the parties have in this court stipulated that the argument in behalf of Dewey in the supreme court of Iowa upon this question contained only the single paragraph quoted in the said stipulation. This paragraph is as follows:

One of the grounds alleged for setting aside the assessment was that the territory within which the plaintiff's lots are situated was unlawfully annexed to the city of Des Moines by virtue of chapter 1, Acts Twenty-third General Assembly. The abstract in this case was prepared before the filing of the opinion of this court in *State ex rel. West vs. City of Des Moines*, 65 N. W. Rep., 818; consequently there were included in the record the allegations as to the invalidity of the proceedings by which said territory, including the lots now in question, was annexed to the city. The decision in that case of course eliminates from this any controversy as to that question, and the plaintiff's right to the relief prayed for rests now upon two propositions, the first going to the validity of the entire tax, and the second to the right to enforce and collect the *contract price*.

See the said stipulation which we have printed in the appendix hereto. The supreme court of Iowa consequently did not consider this question. See its opinion, transcript page 34.

With reference to this question, therefore, it is apparent, first, that no right or immunity under the constitution of the United States was specially claimed in the state supreme court; and, second, that the question was never passed upon by that court, but on the contrary even the question under the state constitution was expressly withdrawn from its consideration by counsel. Under these circumstances it is clear that the question cannot be made for the first time here. It apparently is not seriously urged by counsel, and our answer to them will be very brief.

(a) The real question is whether or not the annexation proceedings were valid so as to give the city of Des Moines jurisdiction over this territory. This has been conclusively

determined by State *ex rel.* vs. City of Des Moines, *supra*, which is binding upon this court inasmuch as it involves purely state questions. Therefore it has been adjudicated that the city of Des Moines had jurisdiction.

(b) The plaintiff in error, a private individual, had not the right to raise the question as to the validity of the municipal organization in a collateral proceeding of this character. See the fourth paragraph of division one of the motion of the Brick Company, record page 26. See

Shapleigh vs. San Angelo, 167 U. S., 651.

National Life Insurance Co. vs. Board of Education of City of Huron, 62 Fed. Rep. 778, 27 U. S. App. 244.

Beach on Public corporations, Sec. 55.

Cooley's Constitutional Limitations, sixth edition, pages 309-310.

City of St. Louis vs. Shields, 62 Mo., 251.

Town of Geneva vs. Cole, 61 Ill., 397.

(c) This is not a federal question.

McCain vs. City of Des Moines, 84 Fed. Rep., 726.

The case just cited was decided in the circuit court for the southern district of Iowa, and involved the identical question which is raised here. It was dismissed for want of jurisdiction on a demurrer to the complainant's bill.

V

Much of counsels' argument is merely a violent attack on the exercise of legislative discretion in imposing this tax. It is perhaps arguments of this class that led Justice Miller to say in Davidson vs. New Orleans (page 104):

In fact it would seem, from the character of many of the cases before us, and the arguments made in them, that the

clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a state court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded.

This branch of counsels' argument we do not propose to answer. We may be pardoned for suggesting that this is not a controversy between the city and the plaintiff in error, but that it is a controversy between the property holder, whose property has received all of the benefit that there is in the improvement and a certificate holder who is in nowise responsible for the situation but whose money has been used to do this work. There is from our standpoint little equity in the contention of the plaintiff in error, that he should have all of the benefits and that we should carry all of the burden. Whether or not this tax is oppressive, whether or not the exercise of the taxing power has in this instance been judicious is not the question that is presented to this court in this case. Over this the court has no jurisdiction. The question is solely a question of power and as to that the unbroken current of authorities leads to but one conclusion.

Respectfully submitted.

N. T. GUERNSEY,

H. T. GRANGER,
J. E. MERSHON,
of Counsel.

*Attorney for Des Moines Brick
Manufacturing Company and the
City of Des Moines, Defendants in
Error.*

APPENDIX.

STATUTES IN FORCE WHEN PRESENT CONTROVERSY AROSE.

SEC. 465, Code of 1873, (McClain's Code of 1888, Sec. 624). They shall have power to provide for the grading and repairs of any street, avenue, or alley, and the construction of sewers, and shall defray the expenses of the same out of the general funds of such city or town, but no street shall be graded except the same be ordered to be done by the affirmative vote of two-thirds of the city council or trustees.

SEC. 466, Code of 1873, (McClain's Code 1888, Sec. 630). They shall have power to construct side-walks, to curb, pave, gravel macadamize, and gutter any highway or alley therein, and to levy a special tax on the lots and parcels of land fronting on such highway or alley to pay the expense of such improvement. But unless a majority of the resident owners of the property subject to assessment for such improvement, petition the council or trustees to make the same, such improvements shall not be made until three-fourths of the members of such council or trustees shall, by vote, assent to the making of the same.

Sections 478 and 479 of the code of 1873, (McClain's Annotated code of 1888 sections 649 and 650,) are as follows:

SEC. 478. Each municipal corporation may, by a general ordinance prescribe the mode in which the charge on the respective owners of lots or lands, and on the lots or lands, shall be assessed and determined for the purposes authorized by this chapter; such charge, when assessed, shall be payable by the owner or owners at the time of the assessment personally, and shall also be a lien upon the respective lots or parcels of land from the time of the assessment. Such charge may be collected and such lien enforced by a proceeding in law or in equity, either in the name of such corporation, or of any person to whom it shall have directed payment to be made. In any such proceedings, where pleadings are required, it shall be sufficient to declare generally for work and labor done, and materials furnished on the particular street, alley

or highway. Proceedings may be instituted against all the owners or any of them, to enforce the lien against all the lots or land, or each lot or parcel, or any number of them embraced in any one assessment, but the judgment or decree shall be rendered separately for the amount properly chargeable to each. Any proceedings may be severed, in the discretion of the court, for the purpose of trial, review or appeal.

SEC. 479. In any such proceeding, where the court trying the same shall be satisfied that the work has been done, or materials furnished, which, according to the true intent of the act, would be properly chargeable upon the lot or land through or by which the street, alley or highway improved, repaired, or lighted, may pass, a recovery shall be permitted, or a charge enforced, to the extent of the proper proportion of the value of the work or materials which would be chargeable on such lot or land, notwithstanding any informality, irregularity, or defect in any such municipal corporation or any of its officers. But in such case the court may adjudge as to the costs as may be deemed proper, and in cases where an assessment shall have been regularly made, and payment shall have been neglected or refused at the time when the same was required, any municipal corporation may be entitled to demand and recover, in addition to the amount assessed and interest thereon at ten per cent from the time of the assessment, five per cent to defray the expenses of collection, which shall be included in any judgment or decree which may be rendered. The provisions and powers conferred in this chapter from section four hundred and sixty-five to section four hundred and seventy-nine, inclusive, shall apply to cities acting under special charters.

Chapter 168 of the Acts of the XXI General Assembly of Iowa, as amended by Chapter 5 of the Acts of the XXII General Assembly.

AN ACT making further provision with respect to contracts by cities of the first class containing a population of over thirty thousand, for paving and curbing streets, and construction of sewers, and the making and collection of assessments and issuance of bonds or certificates to pay for same.

Be it enacted by the General Assembly of the State of Iowa:

SECTION 1. That all cities of the first-class in this state,

containing according to any legally authorized census or enumeration a population of over thirty thousand shall have the powers and be subject to all of the provisions of this act.

SEC. 2. When the council of any such city shall direct the paving, curbing or sewerage of any street or streets the board of public works of such city shall make and enter into contracts for furnishing materials and for curbing and paving or sewerage, as the case may be, of any such street or streets either for the entire work in one contract or parts thereof in separate and specified sections as to them may seem best; provided that no work shall be done under any such contract until a certified copy shall have been filed in the office of the city clerk.

SEC. 3. All such contracts shall be made by the board of public works in the name of the city upon such terms of payment as shall be fixed by the council and shall be made with the lowest bidder or bidders upon sealed proposals after public notice for not less than three weeks in at least two newspapers of said city, which notice shall state the kind and amount of work to be done and specify the different kinds of material for which bids shall be received.

SEC. 4. Each contractor shall be required to give a bond to the city with sureties to be approved by the council for the faithful performance of the contract, and the council shall have power to institute suit in the name of the city to enforce all such contracts.

SEC. 5. It shall be the duty of the city engineer to furnish the board of public works with proper grades and lines and see that the work is done in accordance with the ordinances and regulations of the city with respect to such grades and lines.

SEC. 6. For the purpose of providing for the payment of the cost and expense of any such improvement or improvements, the council shall be authorized from time to time, as the work progresses, upon estimates to be furnished by the board of public works, to make requisitions upon the mayor of the city for the issue of bonds of the city in such sums as shall be deemed best, and it shall be the duty of the mayor to make and execute bonds accordingly in the name of the city to an amount not exceeding the amount of the contract price of any such improvement, and the incidentals attending the same. Said bonds to bear the name of the street or streets improved, to be signed by the mayor, and countersigned by the city clerk, and sealed with the corporate seal of the city, and shall all bear the same date, and be payable seven years after date, and redeemable at any time at the

option of the city, and shall bear interest at the rate of not exceeding six per cent. per annum, payable semi-annually.

SEC. 7. When said bonds shall have been issued by the mayor, and sealed with the corporate seal of the city, they shall be delivered to the clerk, who shall register them in a book to be kept for that purpose, and countersign and deliver them to the committee or person authorized to negotiate the same, taking receipts therefor.

SEC. 8. Said committee or person authorized to negotiate said bonds, shall negotiate the same in such manner as they or he may think best, and for such prices as may be obtainable for the same, not less than par, and shall pay all moneys received therefrom to the treasurer of the city, and report to the city clerk, the number of bonds sold, and the amount received therefor, and before delivering the same to the purchaser they shall be countersigned by the said committee or other person so authorized to negotiate the same.

SEC. 9. All *monies* (moneys) received by the city treasurer from the sale of said bonds shall be kept by him in a separate fund and paid out on requisition of the council, accompanied by affidavit of the city engineer, that work has been done or material furnished to the amount of said requisition and that it is required for payment of the same, and all monies (moneys) received by said treasurer shall be kept in the same manner, and subject to all the regulations regarding other money of the city, except that he shall keep a separate account of the same and all interest received upon the same shall be credited to such fund.

SEC. 10. When any such improvement shall have been completed it shall be the duty of the council to ascertain the entire amount of the bonds sold and the interest thereon to the date of completion which shall be taken to be the costs of such improvement and the entire amount of such cost, including the intersection of streets and alleys shall then be assessed by the board of public works and city engineer, constituting the board of assessors, upon the property fronting or abutting upon said improvement, provided that nothing in this act shall be construed as authorizing the council to assess a greater amount than three dollars per lineal foot on account of the construction of sewers; and provided further that the cost of any such improvement shall not be assessed on property belonging to the state.

SEC. 11. The board of public works shall cause a plat of the street or streets on which any improvement shall be made showing the separate lots of ground and the name of all such owners and the amount assessed against each lot or

piece of ground and shall give two weeks' notice in two newspapers of the city and by hand bills posted in conspicuous places on the line of such street or streets, of the time and place where for the period of twenty days thereafter the same may be seen for the correction of errors, and after having corrected such errors as may be made known to them, said board shall file the same in the office of the city clerk and shall deliver a copy of said plat and schedule to the auditor of the county in which said city is situated.

SEC. 12. Said assessment shall be placed on the tax duplicate or list of the county and shall be payable at the office of the county treasurer in seven equal installments with interest at six per centum from the date of the assessment upon the unpaid portion thereof, the first of which with interest on the whole amount at six per cent. shall be payable at the first semi-annual payment of taxes next succeeding the time said assessment is placed on said duplicate and the others annually thereafter, and said assessment shall be collected in the same manner and bear the same penalties when delinquent as now provided by law for the collection of other taxes.

SEC. 13. Said assessments with interest accruing thereon shall be a lien upon the property abutting upon the street or streets on which any such improvement is made from the commencement of the work, and shall remain a lien until fully paid and shall have precedence over all other liens excepting ordinary taxes and shall not be divested by any judicial sale, provided that such lien shall be limited to the lots bounding or abutting on such street or streets, and not exceeding in depth therefrom one hundred and fifty feet.

SEC. 14. The owner of any property against which an assessment shall have been made for the cost of any such improvement, shall have the right to pay the same in full with interest thereon at six per cent. from the time said assessment was made, or after having paid one or more of said seven installments and interest, he may at any time pay in full the balance of his assessments remaining unpaid with interest thereon at six per cent. from the time when the preceding payment became due, and such payment in full shall satisfy and discharge the lien upon said property, and any owner of such property who shall divide the same so that the feet front on any such improvement are divided into separate lots or parcels may discharge the lien in like manner upon any one or more of such lots or parcels, by payment of the amount unpaid thereon calculated by the

ratio of feet front of such lot or lots or parcel or parcels to the feet front of the whole lot.

SEC. 15. All *monies* (moneys) received from assessments shall be appropriated to the payment of the interest and redemption or payment of the bonds, or of the certificates hereinafter provided for as the case may be that shall be issued for said improvements, and if any interest shall become due on any of said bonds, when there is no fund from which to pay the same, the council shall be authorized to make a temporary loan for the payment thereof.

SEC. 16. If by reason of the prohibition contained in section B, article 11 of the constitution of this state it shall at any time be unlawful for any city to issue bonds as by this act provided, it shall be lawful for such city to provide by ordinance for the issuance of certificates to contractors, who under contract with the city shall have constructed any such improvement, in payment therefor, each of which certificates shall state the amount or amounts of one, or more of the assessments made against an owner or owners and lot or lots on account and for payment of the cost of any such improvement, and shall transfer to the contractor, and his assigns, all of the right and interest of such city to, in and with respect to every such assessment, and shall authorize such contractor and his assigns to receive, sue for and collect, or have collected by every such assessment embraced in any such certificate, by or through any of the methods provided by law for the collection of assessments for local improvements, including the provisions of this act.

SEC. 17. Whenever the owner or owners of any lot or lots, the assessment or assessments against which is or are embraced in any such certificate shall severally promise and agree in writing endorsed on such certificate that, in consideration of having the right to pay his or their assessment or respective assessments in installments, they will not make any objection of illegality or irregularity as to their respective assessments, and will pay the same with interest thereon at such rate not exceeding six per cent., as shall by ordinance or resolution of the city council of such city be prescribed and required, he or they shall have the benefit and be subject to all of the provisions of this act authorizing the payment of assessments in annual installments relating to the lien and collection and payment of assessments so far as applicable.

SEC. 18. Any owner of any lot or lots assessed for payment of the cost of any such improvement who will not promise and agree in writing as provided by section seven-

teen hereof, shall be required to pay his assessment in full, when made, and the same shall be collectible by or through any of the methods provided by law for the collection of assessments for local improvements, including the provisions of this act.

SEC. 19. Any mistake in the description of the property or in the name of the owner shall not vitiate the lien.

SEC. 20. The council of any such city shall not have the right to authorize any improvement under this act unless the owners of two-thirds of the feet front of the property abutting upon the street or streets to be improved shall petition therefor, or unless the same shall be voted for by three-fourths of the members of the council.

SEC. 21. Any part or section of any street may be improved under this act as well as an entire street.

SEC. 22. All acts and parts of acts in conflict with this act are hereby repealed.

SEC. 23. This act being deemed of immediate importance shall be in full force and effect from and after its publication in the Iowa State Register and Des Moines Leader, newspapers published in Des Moines, Iowa.

PRIOR STATUTES.

Sections 34, 38, and 39 of chapter 157 of the acts of the VII General Assembly of Iowa, took effect July 4, 1858, and were substantially reenacted as sections 1064, 1068 and 1069 of the Revision of 1860 of Iowa, which are as follows:

SEC. 1064. They shall have the power to lay off, open, widen, straighten or to narrow or vacate, or to extend and establish, to improve, keep in order and repair, and to light streets, alleys, public grounds, wharves, landing places, and market places, to open and construct, keep in order and repair sewers and drains, to enter upon and take for such of the above purposes as may require it, land or material, and to assess and collect, or on the lots or lands through or by which a street, alley or public highway may pass for the purpose of defraying the expenses of constructing, improving, repairing or lighting such street, alley or public highway in such proportion as to them shall seem just and equitable.

SEC. 1068. Each municipal corporation may by a general by-law or ordinance, prescribe the mode in which the charge on the respective owners of lots or lands, and on the lots or

lands shall be assessed and determined, for the purposes authorized by this act, such charge when assessed shall be payable by the owner or owners at the time of the assessment personally, and shall also be a lien upon the respective lots or parcels of land in the possession of any owner from the time of the assessment, such charge may be collected, and such lien enforced by a proceeding in law, or in equity, either in the name of the municipal corporation, or of any person to whom the municipal corporation shall have directed payment to be made, in any such proceeding at law where pleadings are required, it shall be sufficient to declare generally for work and labor done, and materials furnished on the particular street, alley or highway, and in proceedings in equity when the owner of any lot shall be a non-resident of the county, or unknown notice shall be given by publication in the manner prescribed by law for notice upon absent defendants returned not found, but a publication for one-half the usual time, shall be deemed sufficient, proceedings at law or equity may be instituted against all the owners, or against each or any member of them, as to enforce the lien against all the lots or land, or each lot or parcel or any number of them embraced in any one assessment, but the judgment or decree shall be rendered separately for the amount properly chargeable, any proceedings may be served, in the discretion of the court for the purpose of trial, review or appeal.

SEC. 1069. In any such proceeding where the justice of the peace or the court trying the same, shall be satisfied that work has been done or materials furnished, which according to the true intent of the act would be properly chargeable upon the lot or land through or by which the street, or alley highway improved or repaired or lighted may pass, a recovery shall be permitted, or a charge enforced, to the extent of the proper proportion of the value of the work or materials which would be chargeable on such lot or land notwithstanding any informality, irregularity or defect in any assessment on the part of such municipal corporation, or any of its officers, but in such case the justice or court may adjudge as to costs as may be deemed proper, and in cases where an assessment shall have been regularly made and payment shall have been neglected or refused at the time when the same was required, any municipal corporation shall be entitled to demand, and recover in addition to the amount assessed and interest thereon at ten per cent., from the time of the assessment, five per cent to defray the expenses of collection which shall be included in any judgment or decree which may be rendered.

IN THE SUPREME COURT OF THE UNITED STATES.

C. P. DEWEY, *Plaintiff in Error,*
vs.

CITY OF DES MOINES, C. H. DILWORTH,
COUNTY TREASURER OF POLK COUNTY, AND
DES MOINES BRICK MANUFACTURING
COMPANY, *Defendants in Error.*

STIPULATION.

It is hereby stipulated that, in the printed argument which was filed in this case in the supreme court of Iowa in behalf of C. P. Dewey, the appellant in that court, and the plaintiff in error in this court, there is contained the following statement which refers to his claim founded upon the portion of the petition which is contained in paragraph seven thereof, which said portion of the petition is set out in the transcript of the record in this court commencing at line fifteen on page nine, and ending with line twenty-seven on page fourteen thereof, including exhibit "A" on page fifteen thereof, the said statement above referred to being in words and figures as follows:

"One of the grounds alleged for setting aside the assessment "was that the territory within which plaintiff's lots are sit- "uated was unlawfully annexed to the city of Des Moines by "virtue of chapter 1, acts Twenty-third General Assembly. "The abstract in this case was prepared before the filing of "the opinion of this court in State *ex rel.* West vs. City of "Des Moines, 65 N. W. Rep. 818; consequently there were in- "cluded in the record the allegations as to the invalidity of "the proceedings by which said territory, including the lots "now in question, was annexed to the city. The decision in "that case of course eliminates from this any controversy as "to that question, and the plaintiff's right to the relief

"prayed for rests now upon two propositions, the first going "to the validity of the entire tax, and the second to the right "to enforce and collect the *contract price*."

It is further stipulated that the printed arguments filed by the said Dewey in the supreme court of Iowa in this case contain no other or further reference to the claims asserted by the said Dewey in the said paragraph seven than that above set out.

Dated this first day of November, A. D. 1898.

ANDREW E. HARVEY,
Counsel for Plaintiff in Error.

N. T. GUERNSEY,
*Counsel for Des Moines Brick Manufacturing Company
and City of Des Moines, Defendants in Error.*

No. 122.

JAN 17 1899

JAMES H. MCKENNEY,

Clerk.

~~Sup^e Ct. of Guernsey for N. C.~~

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

Filed Jan. 17, 1899.

NO. 122.

C. P. DEWEY,

Plaintiff in Error,

v.s.

CITY OF DES MOINES ET AL.,

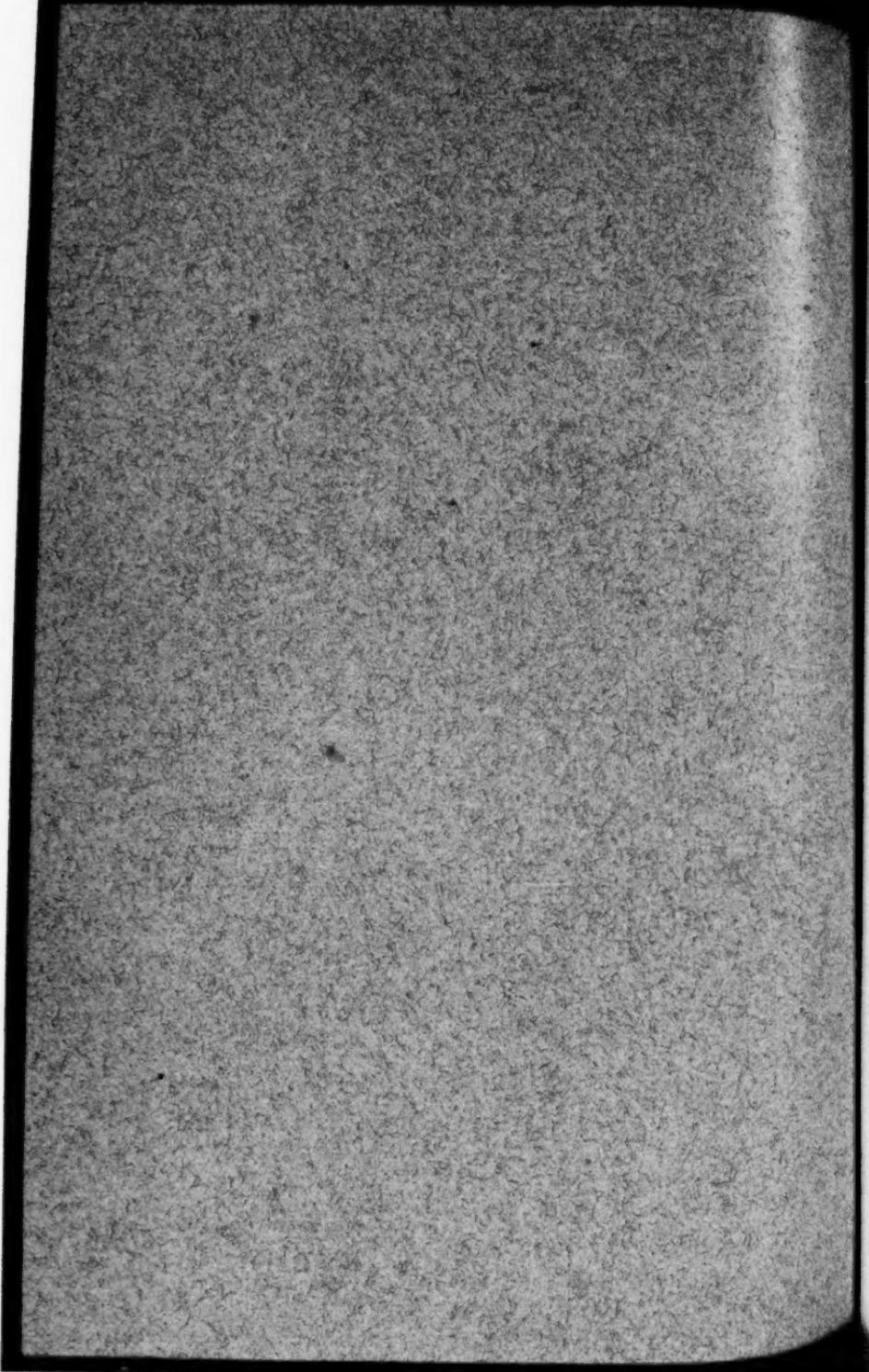
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

SUPPLEMENTAL BRIEF OF DEFENDANTS IN ERROR.

N. T. GUERNSEY,

Attorney for Defendants in Error.



In the Supreme Court of the United States.

OCTOBER TERM, 1898.

C. P. DEWEY,
Plaintiff in Error,

vs.

CITY OF DES MOINES, C. H. DIL-
WORTH, County Treasurer of
Polk County, and DES MOINES
BRICK MANUFACTURING COMPANY,
Defendants in Error.

**SUPPLEMENTAL BRIEF OF THE
DES MOINES BRICK MANUFACTUR-
ING COMPANY AND THE CITY OF
DES MOINES, DEFENDANTS IN ERROR.**

I.

The Village of Norwood vs. Baker.

What is decided in the Village of Norwood vs. Baker is that a statute which permits a town to condemn a street through the property of a single land owner, and to assess against the remainder of the tract through which the street runs the damages paid to her, plus the cost of condemnation, without affording her any opportunity to be heard upon the question of benefits, is

unconstitutional, because it authorizes a taking of her property without due process of law.

The conclusion reached in that case may easily be sustained upon the ground that the facts there showed an effort by indirection to exercise the power of eminent domain. There is nothing in the facts in that case which either requires or would warrant the conclusion that the intention was to overrule the long line of decisions, both by this Court and by the State Courts, growing out of cases of taxation by local or special assessments.

The Authorities Cited in Village of Norwood vs. Baker.

Nor is there anything in the authorities cited by this Court in the Village of Norwood vs. Baker which supports such a conclusion. In Macon vs. Patty, 57 Miss., 378, the question was whether each lot owner might be required to improve the street before his separate property. Such assessments have never been sustained. The objection to them is that there is not such uniformity in the apportionment of the burden as is necessary in all cases of taxation.

See Cooley's Constitutional Limitations, 6th Ed., page 625, where the author says :

" But a very different case is presented when the legislature undertakes to provide that each lot upon a street shall pay the expenses of grading and paving the street along its front, for, while in such a case there would be something having the outward appearance of apportionment, it requires but slight examination to discover that it has a deceptive semblance only, and that the measure of equality which the constitution requires is entirely wanting. If every lot owner is compelled to construct the street in front of his lot, his tax is neither increased nor diminished by the assessment upon his neighbors; nothing is divided or

apportioned between him and them ; and each particular lot is in fact arbitrarily made a taxing district, and charged with the whole expenditure therein, and thus apportionment is avoided. If the tax were for grading the streets simply, those lots which were already at the established grade would escape altogether, while those on either side which chance to be above and below must bear the whole burden, though no more benefited by the improvement than the others. It is evident, therefore, that a law for making assessments on this basis could not have in view such distribution of burdens in proportion to benefits as ought to be a cardinal idea in every tax law. It would be nakedly an arbitrary command of the law to each lot owner only to construct the street in front of his lot at his own expense, according to a prescribed standard ; and the power to issue such command could never be exercised by a constitutional government, unless we are at liberty to treat it as a police regulation, and place the duty to make the streets upon the same footing as that to keep the sidewalks free from obstruction and fit for passage."

This meets the suggestion by a member of the Court during the oral argument of the impropriety of taxing to a single block the expense of a court house or other public building.

It will be noted, further, that the Mississippi Court expressly limits its reasoning to single improvements not a part of a general system, and that it substantially concurs in the reasoning of the Iowa Court in cases where, as in the case at bar, the paving in question is only a small portion of work done in the same manner, all the streets being paved in this way. We quote from the opinion, page 405 :

"The above reasoning applies to local assessments, so far as relates to streets, to make a single improvement which are not of themselves a part of the system which has been already applied, or is then applied, to the whole municipality and to such as are exceptional in character and expense as com-

pared with the burdens imposed on the rest of the community. *It will be at once perceived that if all the streets in a town are required by the same ordinance to be paved, and that the property owners of each street are to pay the cost of paving their own street, the burden is so equalized that we must regard it as but a method of levying a tax on the whole town; and the same result will follow if a large part of the town had been improved by local assessments on the several streets which had been acquiesced in, and a similar ordinance for repaving the remainder would steer clear of the difficulties we have mentioned.* It is only when the state or a municipality selects a part of the streets to be improved in this way, or selects a part to be improved in a manner exceptionally expensive as compared with the rest of the community, that the persons upon whom the burden is cast should have a right to be consulted."

In the Matter of Canal Street, 11 Wendell, 156, involved merely the question whether, after proceedings had been commenced, the Court had power on the motion of the city, not opposed, to order the proceedings discontinued, the ground of the application being that the public benefit from opening the street would be less than the private loss occasioned thereby. This question of power was the sole question decided in that case.

In McCormack vs. Patchin, 53 Mo., 36, the question was whether a special assessment for the repaving with Nicholson blocks of a street already paved would lie. The Court sustained the power to make the assessment, referring to the Hammett case as the only case against it on this question, and refusing to follow it.

In State, &c., vs. Hoboken, 36 N. J. L., 293, there was a direct attack on the assessment by *certiorari*. There the legislature did not attempt to fix the benefits, but delegated the determination of this question to commissioners, who expressly found that the burden in each instance exceeded the benefit. Under the

statute the assessment was expressly limited to the amount of benefits found.

The Court properly decided that under this statute the assessment, in view of this finding, could not be sustained. In the opinion it throws in the suggestion that if the statute had not contained this provision it would have been unconstitutional.

This statement is purely *dictum*, and entirely foreign to the point decided in the case.

State, Agens pros., vs. Mayor, &c., of Newark, 37 N. J. L. 416, and Bogert vs. City of Elizabeth, 27 N. J. Eq., 568, we assume, arose under this same statute.

Hammett vs. Philadelphia, 65 Pa. St., 146, is not in point, as clearly appears from Michener vs. Philadelphia, 118 Pa. St., 535, to which reference was made on the oral argument. In the Michener case the facts were as follows:

The proceeding was one to enforce a sewer assessment against a lot abutting on three streets, where there had been one sewer constructed across the lot, and it had been assessed to pay for two sewers in the streets adjoining it, the assessment in question being for a sewer upon the third street. It was expressly set up that this sewer was unnecessary and of no benefit to the property owner, but, on the contrary, a positive detriment to his property. This was held to constitute no defense. In the opinion the Court says:

"Hammett vs. The City appears to be misunderstood to some extent. At least it is frequently cited as covering a much broader view than its facts and the decision thereon warrant.

* * * It will thus be seen that none of the cases cited sustains the contention of the plaintiff in error. Of the necessity of the present sewer we cannot, of course, speak, nor are we required to do so. The councils are the sole judges of the necessities of sewers, and their judgment is conclusive. It is not our province to encroach upon the functions of other public officers.
* * * The plaintiff alleges, however, that his

property is not benefited by the sewer. He may or may not be mistaken in this. We cannot say. But this is a species of taxation, and all taxations are presumed to be for the benefit, directly or indirectly, of the taxpayer or his property. Laid, as taxes are, under general laws, there will always be cases of apparent individual hardship. The childless man may claim that the taxes which he is compelled to pay for the education of the children of other persons confers no benefit upon him. The law does not so regard it. Education produces a higher degree of intelligence, the fruits of which are seen in increased good order and diminished crime. When a man comes to pay his general taxes he cannot be permitted to allege that he derives no benefit therefrom. And it would be intolerable if in every instance of special taxation the question of benefits should be thrown into the jury box. It would introduce into the municipal government a novel and dangerous feature. It would substitute for the responsibility of councils, limited though it be, the wholly irresponsible and uncertain action of jurors. It is better 'to endure the ills we have than to fly to those we know not of.'

This doctrine is emphasized by other Pennsylvania cases to which we shall later refer.

Nor is the Vermont case in point so far as the present controversy is concerned. It involved no question of benefits as presented here.

In that case—*Barnes vs. Dyer*, 56 Vt., 469—there was involved the validity of a law requiring the assessment of the cost of sidewalks upon abutting property. The statute required the assessment to be "just and equitable." The sole question determined was whether the words "just and equitable" sufficiently prescribed a rule for the apportionment of the burden. The Court held they did not, and on this ground alone held the law unconstitutional. In the opinion the Court says:

To secure this protection the courts have held that legislative enactments must set up a stand-

ard, fix a rule to be conformed to as a guide in all cases, and a uniform certain rule, so far as reasonably practical, and not susceptible to different application to different individuals of the class to which it applies. If the enactment fails in this regard it is deemed fatally defective.

In *Thomas vs. Gain*, 35 Mich., 155, there was involved a similar question, viz., how sewer taxes should be apportioned. It was held that an apportionment by area was unusual, and, under the circumstances of that case, unreasonable. The Court says as to sewers (p. 164) :

"In what has been said it is not intended to decide or to intimate that a sewer tax may not, under some circumstances, be lawful, though apportioned by the area of the lots assessed. If, under the law providing therefor, the assessment were confined exclusively to lots lying contiguously to each other, and on or near the street in which the sewer was to be constructed, and all properly urban lots, or, as they are sometimes designated, in-lots, as distinguished from the outer lots of the town, which receive only slight and indirect benefits from such improvements, and if the law also provided for private drains into the sewer as a matter of right on the part of the proprietors of the lots assessed, the case would be so different from the one now before us that much of what we have said would have no application."

And in the same opinion, referring to assessments such as the one in the case at bar, Judge COOLEY (p. 161) says :

"It has been decided in this state that assessments for paving and similar taxes may constitutionally be made in proportion to the frontage of lots along the improvement. The idea that underlies statutes for this purpose is that the benefit to the abutting lots is generally in proportion to the length of their respective fronts, and that, as a rule, this principle of apportionment is more just

than any other. There is a basis of truth to this idea, and it is so generally accepted that assessments for street improvements are perhaps now more generally apportioned by the frontage than by any other standard. In Warren vs. Grand Haven, 30 Mich., 74, it was held that the Court could not say, as matter of law, that an assessment for a sewer estimated by the foot-front of abutting lots was not laid in proportion to actual or probable benefit."

This review of the authorities cited in the Village of Norwood case demonstrates that they do not warrant the conclusion that the legislature has not power to determine that an abutting lot is benefited by paving to the extent of the cost of the improvement. None of these cases involves this exact question, and we believe that the extracts which we have made show clearly that so far as they have touched upon this question, these courts support the contention of the defendant in error here.

Other State Authorities.

That this conclusion is sound is demonstrated by numerous cases, not cited in the Village of Norwood case, to which reference might be made.

In Davies vs. City of Saginaw, 87 Mich., 439, 451-2, where the objection was made that the assessment was not limited to the special benefits received, it is held that the conclusion of the city council upon this matter was final.

See, also, Shimmons vs. City of Saginaw, 104 Mich., 511.

The leading case in Michigan on the question of special assessments is Williams vs. Mayor, etc., of Detroit, 2 Mich., 560. This was a bill to enjoin a special assessment for paving, which was laid in proportion to the frontage, as was the assessment in the case at bar. We call special attention to the opinion in this case

upon the constitutional question. It considers the question fully, and decides that this method of apportionment is a fair method of apportioning the burden, and that it does not constitute taking property without due process of law, but is an exercise of the right of taxation. We cannot forbear making a single extract (pp. 568 & 569); referring to the levy of the assessment in this particular street, the court says:

"Assuming that the proceedings were regular and in conformity to the law under which they attempted to act, it is difficult to perceive why this should be considered a private and exclusive tax. It was levied under a public law by a municipal corporation, created for local but public purposes, and the proceeds of the assessment were to be devoted to a particular public use. It is not questioned that the common council had power to levy a tax upon the whole city for paving all the streets within its boundaries, and it is conceded that the constitution and the charter would sanction the taxation of each ward for the expense of all improvements in it. Where, then, is the injustice in assessing a smaller district for the expense of improvements within it? The result would be practically the same if the same rule of apportionment is applied. If a ward were assessed for the paving of all the streets within it, such improvements would obviously be a great benefit to the ward, and, although the tax would be more burthensome for the time being than if the expense of these particular improvements were assessed upon the whole city, yet that ward is relieved from the burthen of taxation for similar wards of the city."

This suggests the reasoning of the supreme court of Iowa, with reference to this matter.

In Motz *et al.* vs. Detroit, 18 Mich., 495, the constitutionality of a special assessment was sustained. The opinion is by Judge COOLEY. The case of Williams vs. The Mayor, etc., of Detroit, *supra*, is referred to and is followed.

An examination of these cases will demonstrate that the supreme court of Michigan is committed to the doctrine, first, that the special benefit that is conferred upon a street authorizes the legislature to make the street a taxing district to pay for paving, and, second, that the burden here imposed does not come within the constitutional provision with reference to the exercise of eminent domain. The rule is also clearly recognized that the determination of the legislature is conclusive on the matter of benefits.

See, also, *City of St. Louis vs. Ranken*, 96 Mo., 497-505, from which we quote as follows:

"The determination of the question what property of the citizens will be benefited by a public improvement is the exercise of legislative power, whether exercised by the legislature directly or by municipal authorities, to whom the power is delegated for that purpose, and 'due process of law is not essential to its legitimate exercise.' These authorities may determine directly the district in which property will be benefited, and the amount of the benefit, and direct a uniform standard for its apportionment therein."

In Kentucky this is apparently the rule. In *Nevin vs. Roach*, 86 Ky., 493, affirmed on motion by this court, where it is reported as *Walston vs. Nevin*, 128 U. S., 578, the Supreme Court of Kentucky says:

"The question made as to benefits to be derived from a local improvement in order to impose the burden has been raised, if not directly decided, in many of the reported cases, and, while it has even been shown, and particularly in this case, that no pecuniary gain by an increased value of the property is apparent by reason of such improvements, it is manifest that such improvements conduce to the rapid and prosperous growth of cities, and result in increasing the value of real estate as such improvements are extended. All such assessments are made upon the idea that the property subject to such is benefited by reason of the charge upon

it; but to require the city or the contractor in every case to show the immediate advantages resulting to the owner from the construction and improvement of streets in the way of pecuniary benefit would be to prohibit, in effect, such improvements by means of local burdens. As said by the special chancellor below, the land may be benefited in many ways and not easily determined upon the basis of money values. * * * This method of assessment has been so long followed by the city government and approved by this court that it no longer remains an open question, and the same may be said of the question of notice to the taxpayer that he may appear and show why he should not pay his proportion of the cost of the improvement."

The rule is recognized in California in the Pacific Bridge Company vs. Kirkham, 64 Cal., 519.

In Minnesota the same doctrine prevails.

See State vs. District Court of Ramsey County, 29 Minn., 62-65. There the Court says :

"It has been decided in this court that the determination by this board of public works of the facts as to what property is benefited, and the extent of such benefit, is, under the statute, conclusive in the absence of fraud or of demonstrable mistake of fact."

This is the rule in Illinois.

See White vs. The People *ex rel.*, 94 Ill., 604-613, from which we quote :

"Whether or not the special tax exceeds the actual benefit to the lot is not material. It may be supposed to be based on a presumed equivalent. The city council have determined the frontage to be the proper measure of probable benefits. That is generally considered as a very reasonable measure of benefits in the case of such an improvement, and, if it does not in fact in the present case represent the actual benefits, it is enough that the city council have deemed it the proper rule to apply."

Another Pennsylvania case illustrating the rule is *The City of Harrisburg vs. McCormick*, 129 Pa. State., 213. In that case it was held that the decision on the matter of benefits was final, even though under peculiar circumstances it appeared that the amount of the assessment exceeded the value of the property.

This is the rule in Wisconsin, announced in the case of *Lumsden vs. Cross*, 10 Wis., 282, 288. This case recognizes the power of the legislature to determine this matter of benefits, and to delegate this power to cities, and points out the remedy for any abuse of this power, which is an appeal to the legislature to limit the authority delegated to municipalities.

The same rule is announced in Kansas, in *Atchison, etc., Railroad Co. vs. Peterson*, not yet officially reported, but which is to be found in 48 Pac. Rep., 877. This involved both the question of personal liability and the matter of benefits, the assessment being against a railroad which received no actual benefit whatever. Referring to the question of personal liability the Court says :

"There are but two states in the Union—to wit, California and Missouri—that have held that such assessments cannot be made a personal charge against the resident owners, and these are the authorities cited by counsel in their brief in support of their contention that such assessments cannot be made a personal charge."

The Court proceeds to sustain the personal liability. With reference to the matter of benefits it says :

"So that, when we have determined that these lands, notwithstanding they are used by the railroad in performance of its duties as a common carrier, are subject to these special assessments, the question of benefits is a fact that the legislative authority has determined and the Court cannot inquire into."

In *Little Rock vs. Katzenstein*, 52 Ark., 107, the same rule is announced. In that case the Court says :

"It has been so often said as to become axiomatic that absolute equality in the distribution of benefits and burdens is unattainable, yet it is also virtually held that the very existence of the justice and equity of the power of taxation rests upon the theory of corresponding benefits to the taxpayer."

In conclusion upon the question of benefits the court cites numerous authorities supporting the rule :

"That the action of the city council in including property in an improvement district is conclusive of the fact that it is adjoining the locality to be effected, except when attacked for fraud or demonstrable mistake."

In passing we may say that it is decided by the supreme court of Pennsylvania, *In re Centre Street*, 115 Pa. St., 253, that it is a matter of legislative discretion whether or not personal liability shall be imposed and that the English rule is to impose personal liability in special assessments.

See Vestry of Bermondsey vs. Ramsey, 6 Law Rep. C. P., 247.

Plumsted Board of Works vs. Ingoldby, 8 Law Rep. Exch., 63.

Same case on appeal, 8 Law Rep. Exch., 174.

It would be interesting if the time within which this brief must be filed would permit it to continue this examination through the remainder of the states. We think it would be found that the rule laid down in the authorities which we have cited is sustained practically without dissent by all the state courts.

Special assessments do not take property without due process of law. We quote from Cooley's Constitutional Limitations, Sixth Edition, page 612, as follows :

"It has been objected, however, to taxation upon this basis that, inasmuch as the district in

which the burden was imposed is compelled to make the improvement for the benefit of the general public, it is, to the extent of the tax levied, an appropriation of private property for the public use ; and, as the persons taxed as a part of the public would be entitled of right to the enjoyment of the improvement when made, such right of enjoyment could not be treated as compensation, for the exaction which is made of them exclusively, and such exaction would, therefore, be opposed to those constitutional principles which declare the inviolability of private property. *But those principles have no reference to the taking of property under legitimate taxation.* When the constitution provides that private property shall not be taken for public use without just compensation made therefor, it has reference to an appropriation thereof under the right of eminent domain. Taxation and eminent domain indeed rest substantially upon the same foundation, as each implies the taking of private property for the public use on compensation made ; but the compensation is different in the two cases. When taxation takes money for the public use, the tax payer receives, or is supposed to receive, his just compensation in the protection which government affords to life, liberty and property, in the public conveniences which it provides, and in the increase of value of possessions which comes from the use to which the government applies the money raised by the tax ; and these benefits amply support the individual burden."

In support of this proposition Judge COOLEY cites numerous cases, The People vs. The Mayor, etc., of Brooklyn, 4 N. Y., 419, which has received the direct approval of this Court, being one of them.

Another well-settled rule is stated by Judge COOLEY in his Constitutional Limitations, sixth edition, page 624, as follows :

" On the other hand, and on the like reasoning, it has been held equally competent to make the street a taxing district and assess the expense of the improvement upon the lots in proportion to the frontage. Here, also, is apportionment by a

rule which approximates to what is just, but which, like any other rule that can be applied, is only an approximation to absolute equality. *But if, in the opinion of the legislature, it is the proper rule to apply to any particular case, the courts must enforce it.*"

The Doctrine of this Court.

The rules so conclusively settled by the state courts are the settled law of this Court. Perhaps the leading special assessment case here is Davidson vs. New Orleans, 96 U. S., 97. In that case the court held that the fact that a personal obligation was imposed did not raise any question under the 14th amendment.

The further objection was raised that the benefits exceeded the burden. Upon this question the court says :

"It is said that the property of the plaintiff assessed is not benefited by the improvement, but this is a matter of detail with which this court cannot interfere, if it were clearly so; but it is hard to fix a limit within these two parishes where property would not be benefited by the removal of the swamps and marshes which are within their bounds."

Because in an isolated case there might be an inequality, the court in the Davidson case was not misled into condemning the entire proceeding with the law upon which it was founded.

The next case presenting this question is Mobile County vs. Kimball, 102 U. S., 704. In that case the burden of paying for the improvement of Mobile harbor was fixed upon Mobile county, although the benefit was shared by at least a large part of the remainder of the state. This unequivocally sustains the proposition that the discretion of the legislature to determine that a district specially benefited by an improvement shall bear the burden of that improvement is absolute,

and determines further that the courts have no control whatever over the exercise of this discretion.

An examination of the opinion will show that the conclusion of the court is not founded upon any comparison between the amount of the benefit and the amount of the burden, nor is that even suggested as material.

The next case is *Hagar vs. The Reclamation District*, 111 U. S., 701. That was a case of an assessment for drainage purposes, and it is there held that where special benefits ensue to a particular district the burden of paying for the improvement may be imposed upon that district, the only limitation of this power being that the imposition shall be uniform and that there shall be an opportunity to be heard. In that case the Court says:

“Whenever a local improvement is authorized it is for the legislature to prescribe the way in which the means to meet its cost shall be raised, whether by general taxation or by laying the burden upon the district specially benefited by the expenditure.”

In *Head vs. Amoskeag Mfg. Co.*, 113 U. S., 9, and *Wurts vs. Hoagland*, 114 U. S., 606, *Davidson vs. New Orleans* is cited with approval.

We call special attention to *Spencer vs. Merchant*, 125 U. S., 345, because in the *Village of Norwood vs. Baker* this Court expressly distinguishes the two cases.

We have quoted from this case at length in our original brief in this Court (see p. 27).

In this case this Court says:

“The power to tax belongs exclusively to the legislative branch of the government.”

And further:

“The legislature, in the exercise of its power of taxation, has the right to direct the whole or a

part of the expense of a public improvement, such as the laying out, grading or repairing of a street, to be assessed upon the owners of the lands benefited thereby. And the determination of the territorial district which should be taxed for a local improvement is within the province of legislative discretion."

It says further :

"If the legislature provides for a notice to and hearing of each proprietor, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law."

Davidson vs. New Orleans is cited with approval, and the court proceeds :

"In the absence of any more specific constitutional restriction than the general prohibition against taking property without due process of law, the legislature of the state, having the power to fix the sum necessary to be levied for the expense of a public improvement, and to order it to be assessed, either like other taxes, upon property generally, or only upon the lands benefited by the improvement, is authorized to determine both the amount of the whole tax, and the class of lands which will receive the benefit, and should therefore bear the burden, although it may, if it sees fit, commit the ascertainment of either or both of these facts to the judgment of commissioners.

"When the determination of the lands to be benefited is entrusted to commissioners, the owners may be entitled to notice and hearing upon the question whether their lands are benefited and how much. But the legislature has the power to determine, by the statute imposing the tax, what lands, which might be benefited by the improvement, are in fact benefited ; and, if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands

are benefited or not, but only upon the validity of the assessment, and its apportionment among the different parcels of the class which the legislature has conclusively determined to be benefited."

In passing the Court will note that there is no statement that the benefits must exactly equal the burden imposed. What is decided is that, where land is specially benefited, this fact will warrant the legislature in determining that it should constitute a separate taxing district for the purpose of bearing the burden of the improvement which causes the benefit.

The court continues :

"In determining what lands are benefited by the improvement, the legislature may avail itself of such information as it deems sufficient, either through investigations by its committees, or by adopting as its own the estimates or conclusions of others, whether those estimates or conclusions previously had or had not any legal sanction."

The Court then proceeds to hold that the act of the legislature in imposing this assessment upon these lands was a conclusive determination that they had been benefited to the extent of the burden imposed upon them.

In *Huling vs. Kaw Valley Ry. & Imp. Co.*, 130 U. S., 559, and *Bell's Gap Ry. Co. vs. Pa.*, 134 U. S., 232, *Davidson vs. New Orleans* is again cited with approval.

Lent vs. Tillson, 140 U. S., 316, is another special assessment case. In this case *Davidson vs. New Orleans*, *Hagar vs. Reclamation District*, and *Spencer vs. Merchant* are cited with approval, and the following extract is made from the *Merchant* case :

"The legislature, in the exercise of its power of taxation, has the right to direct the whole or a part of the expense of a public improvement, such as the laying out, grading or repairing (and, equally, widening) of a street, to be assessed upon the

owners of lands benefited thereby; and the determination of the territorial district which should be taxed for a local improvement is within the province of legislative discretion."

The Court says further in that case:

"It is contended, however, that the act was so administered as to result in depriving the plaintiffs of their property without due process of law. This contention is material only so far as it involves the inquiry as to whether the tribunals charged by the statute with the execution of its provisions acquired jurisdiction to proceed in respect to the lots or lands in question and the owners thereof. Jurisdiction was, of course, essential before the plaintiff's property could have been burdened with this assessment. But errors in the mere administration of the statute, not involving jurisdiction of the subject and of the parties, could not justify this Court in its re-examination of the judgment of the state court, upon writ of error, to hold that the state had deprived, or was about to deprive, the plaintiffs of their property without due process of law. Whether it was expedient to widen Dupont street, or whether the board of supervisors should have so declared, or whether the board of commissioners properly apportioned the costs of the work or correctly estimated the benefits accruing to the different owners of property affected by the widening of the street, or whether the board's incidental expenses in executing the statute were too great, or whether a larger amount of bonds was issued than should have been, the excess, if any, not being so great as to indicate upon the face of the transaction a palpable and gross departure from the requirements of the statute, or whether upon the facts disclosed the report of the commissioners should have been confirmed, are, none of them, issues presenting federal questions, and the judgment of the state court upon them cannot be reviewed here."

In Paulsen vs. Portland, 149 U. S., 30, the question was as to the validity of a sewer assessment. Among other objections made to it was the claim that the

property of the plaintiffs "was and is a long distance away from said Tanner creek sewer, and never would or could be benefited by said sewer, and that a considerable portion of said property was lower in elevation than the bottom of said sewer, and that it was physically impossible for said property to be drained into said sewer or to be benefited by it in any way."

In an opinion, to which no dissent was indicated, this assessment was upheld.

This case holds that failure in the statute to prescribe a formal notice will not render the statute void, quoting with approval from a Kansas case, as follows:

"Where a statute authorizes a city to provide for the construction of sewers and drains, and to tax the costs thereof upon the adjacent property owners, but does not require that any notice shall be given to the property owners, held that such failure to require notice does not render the statute unconstitutional or void, but notice must nevertheless be given, and the city would have a broad discretion with reference to the kind of notice and the manner of giving the same."

To digress for a moment, in the case at bar the statute provides for a hearing. If it did not or if this provision were incomplete it would be the duty of the city to provide for one. There is no averment that such provision was not made, nor is there any averment that notice was not given, the only averment on the question of notice being that the notice given was by publication in the newspapers and by posting along the line of the work, which has frequently been held to be sufficient notice in a tax case. This is decided in the Paulsen case and in Lent vs Tillson, *supra*.

It may be said here, as it was said in the Paulsen case, "as the form of the notice and the time of its publication are not affirmatively disclosed in the complaint, it must be assumed that there was no defect in respect to these matters."

This case also recognizes the power exercised there

by the city to determine the territorial district to be taxed for a local improvement.

Another case is Fallsbrook Irrigation District vs. Bradley, 164 U. S., 112.

This case expressly reaffirms Davidson vs. New Orleans.

In taking up the consideration of that case this Court says :

" If the act violate any provision, express or properly implied, of the federal constitution, it is our duty to so declare it, but if it do not, there is no justification for the federal courts to run counter to the decisions of the highest state courts upon questions involving the construction of state statutes or constitutions, on any alleged ground that such decisions are in conflict with sound principles of general constitutional law."

One objection made to the act there was, that no opportunity was given to the land owner for a hearing on the question whether his land was or could be benefited by the proposed irrigation ; and another, that the basis of assessment was not in proportion to the proposed benefits ; and, finally, that land which could not be benefited might be subject to the assessment.

In that opinion this Court recognizes the power of the legislature to settle and determine the question of benefits. This power having been delegated by the act in question to a subordinate tribunal, the Court says :

" We are of the opinion that the decision of such a tribunal in the absence of actual fraud and bad faith would be, so far as this Court is concerned, conclusive upon that question. It cannot be that upon a question of fact of such a nature this Court has the power to review the decision of the state tribunal which has been pronounced under a statute providing for a hearing upon notice."

Proceeding, this Court says, with reference to this question :

"The difference between this case and the case of Spencer vs. Merchant (125 U. S., 353) is said by counsel for appellees to consist in the fact that in the Spencer case the lands in question might have been benefited, while here the additional benefit to land already capable of beneficial use without irrigation is in no legal or proper sense a benefit which can be considered for the purpose of an assessment. We think this alleged difference is not material. It is in each case one of degree only, and the fact of the benefit is by the act to be determined after a hearing by the board of supervisors. In this case the board has necessarily decided that question in favor of the fact of benefits by retaining the lands in the district. Unless this Court is prepared to review all questions of fact of this nature decided by a state tribunal where the claim is made that the judgment was without any evidence to support it, or was against the evidence, then we must be concluded by the judgment on such a question of fact, and treat the legal question as based upon the facts as found by the state board."

Referring further to this question of benefits, this court says:

"A question of this kind would involve no constitutional element, and its solution would depend upon the ordinary jurisdiction of courts of justice over this class of cases. It is not pretended that such jurisdiction has been invoked or exercised here. As was said by Mr. Justice MILLER in Davidson vs. New Orleans (96 U. S., 97), where the objection was made that part of the property was not in fact benefited, 'this is a matter of detail with which this court cannot interfere if it were clearly so, but it is hard to fix a limit within these two parishes where property would not be benefited by the removal of the swamps and marshes which are within their bounds.'"

This court cites to the same effect the Spencer and Lent cases, *supra*.

In Baumann vs. Ross, 167 U. S., 548, all of these authorities are elaborately reviewed, and these proposi-

tions are reaffirmed by this court in a most exhaustive and well-considered opinion.

From the statement which the court there makes of the principles which underlie these cases we take the following extracts :

"The legislature, in the exercise of the right of taxation, has the authority to direct the whole or such part as it may prescribe of the expense of a public improvement, such as the establishing, or the widening, or the grading or repairing of a street, to be assessed upon owners of lands benefited thereby. * * * The class of lands to be assessed for the purpose may be either determined by the legislature itself, by defining the territorial district or by other designation, or it may be left by the legislature to the determination of commissioners, and may be made to consist of such lands, and such only, as the commissioners shall decide to be benefited."

In this connection the Court characterizes as very able the opinion delivered by Judge RUGGLES in *People vs. Brooklyn, supra*. Continuing in *Bauman vs. Ross*, the Court says :

"The rule of apportionment among the parcels of lands benefited also rests within the discretion of the legislature, and may be directed to be in proportion to the position, the frontage, the area or market value of the lands, or in proportion to the benefits as estimated by commissioners. If the legislature, in taxing lands benefited by a highway or other public improvement, makes provision for a notice by publication or otherwise to each owner of land, and for hearing him at some stage of the proceedings upon the question of the proportion of the tax that shall be assessed upon his land, his property is not taken without due process of law."

In *Williams vs. Eggleston*, 170 U. S., 304, this doctrine is stated as something which cannot be doubted.

The Court says :

"Neither can it be doubted that if the state constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determining what territory shall belong to such district and what property shall be considered as benefited by a proposed improvement. And in so doing it is not compelled to give notice to parties resident within the territory or permit a hearing before itself, one of its committees or any other tribunal, as to the question whether the property so included within the taxing district is in fact benefited."

It is inconceivable that this court has intended to overrule this line of authorities by the Village of Norwood vs. Baker, in which the only reference to them is the distinction which is drawn between Spencer vs. Merchant and the Baker case.

III.

The rule to be deduced from the authorities.

Every statute which imposes upon a limited district the cost of a public improvement involves the question, first, whether the limits of the district have been properly determined; and, second, whether a proper rule of apportionment has been adopted so that uniformity is secured.

In one of the extracts that we have made from Cooley on Constitutional Limitations, he states what is a matter of common knowledge, that the assessment of the cost of paving a street upon the property abutting on the street in proportion to the frontage has generally been accepted as a proper exercise of the

taxing power, in view of both of the considerations to which reference has just been made. The Norwood case quotes from Cooley on Taxation a statement that special assessments are made upon the assumption of special benefits. There is no conflict between these two statements of this eminent author. There will be found no statement in any reported case, or, we believe, by any reputable author, to the effect that such assessments must be based upon direct and certain benefits which can be shown by proof to equal the amount of the assessment.

If this were true, such an assessment would not be taxation, and to characterize it as a burden, as is done almost universally by the text writers and by the courts, would be a misnomer. A tax does not return in direct compensation all that it exacts. The authorities, to many of which we have referred, hold that benefits are to be considered in determining the taxing district. This is the extent to which they go, however. What the courts have held is, that the discretion of the legislature with reference to fixing taxing districts is not absolutely unlimited, and that it cannot be exercised arbitrarily.

They have uniformly held, however, that the fact of special benefit to abutting property is a sufficient basis for an exercise of legislative discretion constituting such property a taxing district for the purpose of paying for the improvement in question ; and have also uniformly held that such action on the part of the legislature is a conclusive determination that the property has been benefited to the extent of the burden imposed upon it. While the great mass of the authorities holds that special assessments are based upon benefits, none of them hold that the amount of the benefit, where the obligation is fixed by the legislature, is an open question ; nor do they hold that the benefit must be certain and direct. In this connection we call special attention to the case of Nevin vs. Roach, *supra*, decided by the supreme court of Kentucky.

The rule to be deduced from the authorities is that, where property manifestly derives a special benefit from a local improvement, this fact is sufficient to support a legislative determination that such property shall constitute a special taxing district charged with the expense of this improvement.

This rule is not affected by the Village of Norwood case.¹ All that can be claimed for that case is, that it holds that where there is not any apparent benefit, the legislature cannot arbitrarily establish a taxing district without giving the parties a right to be heard. It is analogous to holding that there is no evidence to support a verdict. But where, as in the case at bar, there is obvious benefit, this the courts all hold supports the finding of the legislature as to the taxing district and benefits.

The Village of Norwood vs. Baker does not touch this proposition. What it holds is that, in a case where no benefit was obvious, but damage was apparent, there existed at least a right to review the conclusion of the legislature on the question of benefits, because this conclusion was apparently not supported by any reason, but was purely arbitrary. This cannot be said of a "front-foot" assessment, which has been again and again sustained as a conclusion of the legislature, not arbitrary, but founded upon sufficient reason.

The Village of Norwood case is more nearly analogous to the Iowa and Kentucky doctrine referred to by Judge COOLEY in his Constitutional Limitations (5th Ed.), page 626, where he says :

"The Kentucky and Iowa decisions hold that, in a case where they have manifestly and unmistakably done so, the courts may interfere and restrain the imposition of municipal burdens on property which does not properly belong within the municipal taxing district at all. It must be manifest, however, that the effect of the decisions in the states last referred to is to establish judi-

cially two or more districts within a municipality where the legislature has established one only; and, as this is plainly a legislative function, it would seem that the legislature must be at least as competent to establish them directly as any court can be to do the same thing directly."

It will be noted that it is obvious that this doctrine, upon principle, does not meet with Judge COOLEY's approval.

III.

This doctrine applied to the case at bar

In the case at bar it must be conceded :

1. That there was benefit to the property by virtue of this pavement, which is such a special benefit as has been uniformly held to warrant an assessment of the cost upon the abutting property.
2. That the method of apportionment is one which has often been sanctioned by the courts as proper—it being (as is said by Judge COOLEY in one of the extracts which we have made from his work on Constitutional Limitations) the usual method in such cases.
3. That this is not a single assessment of the entire cost of the improvement against a single individual, but is an assessment against a few lots for a portion of the cost of a mile of paving, all assessed against abutting property, and laid as a part of a general system of pavement paid for in the same way.

The question presented is whether, under these circumstances, and in a collateral proceeding, although the law affords an opportunity to be heard, the plaintiff

in error can, upon his bald assertion that the tax levied against him exceeds the direct and immediate benefit to him, without saying that this is not due to an error in apportionment without saying that this was true as to any other property affected by this law, without saying that this excess is substantial in amount, and without denying that there are general and indirect benefits which he has received, review the determination of the legislature of Iowa upon this question of benefits.

This is not a question of excess over the value of the lots, because, if the proposition of plaintiff in error is sound, the value of the lots is wholly immaterial. If this question of benefits is an open question, the plaintiff is deprived of his property without due process of law, upon the theory of counsel for plaintiff in error, whenever the direct and positive benefit is less than the burden, whatever the value of the lots may be. If the direct and positive benefit were \$50 and the burden were \$100, it makes no difference whether the lot be worth \$1 or \$10,000.

To sustain his contention means to overthrow the entire law of special assessments. It means that the legislature, where it is conceded that there is special benefit to the property, has no power whatever to determine the amount of this benefit, and that its determination is always open to review. It means further that this determination need not be attacked directly, but that a collateral attack will lie. It is even more far-reaching than this. It means that, wherever a tax is levied, the person who is taxed may come in and resist the payment of it on the ground that the direct benefit received by him is less than the burden which the tax imposes.

Taking the averments of the bill of plaintiff in error to be true, this is nothing more nor less than a case where a law imposing a proper burden in a usual and approved manner, only to the usual and ordinary amount, has in its administration worked hardship to a

single individual. This has never been held to condemn such a law as unconstitutional. Even if this be a hard case, it does not warrant this Court in taking away from the legislature authority that has always been conceded to it. The fact that in a single instance its discretion has resulted in hardship is not a violation of any constitutional right; nor is it even strange or unprecedented.

One other suggestion upon this question of benefits: suppose that a special assessment were levied for the portion of the tax which the plaintiff in error concedes equals his benefits, and that a general tax for the balance were levied upon him and upon others; if the argument of plaintiff in error is sound, there would be no benefit to sustain the levy for this balance, and it must fall. This is the logical result of his argument upon this proposition; and yet no consideration of this question can ignore the fact that there existed power to levy a tax upon the proper persons for this entire expense, and that this power may be founded upon the benefit which it is assumed will accrue to them.

IV.

The Right to be Heard.

We call attention again to the provision in the statute with reference to a hearing (see Sec. 11; Brief, p. 58); We also call attention to the Paulsen case, *supra*, which holds that the presumption is that the city supplied any deficiency of the statute in this regard. There is no averment in the bill that the plaintiff in error did not have a right and an opportunity to be heard upon this question of benefits or upon any other question. For this reason, therefore, the case of Village of Norwood vs. Baker is not in point, because the conclusion there is founded upon the proposition that there was no opportunity to be heard.

V.**This question was never raised in the State Court.**

This proposition is argued on pages 9 *et seq.* of our original brief.

In addition to the authorities there cited, we call attention to

Kipley vs. Illinois, 170 U. S., 187.

Miller vs. Cornwall, 168 U. S., 131.

Winona & St. P. Land Co. vs. Minn., 159 U. S., 540.

Each of these cases sustains the proposition that, where a statute is assailed as unconstitutional, the federal right must be specially set up and claimed. No such right as is here asserted was set up in this case before it reached this court (see brief of plaintiff in error, p. 19).

(The reference in our brief to page 14 is due to the difference in the paging between the two briefs filed by the plaintiff in error. The reference on page 22 of our brief to page 27 of the brief of plaintiff in error, for the same reason should be to page 44).

To recapitulate what was said at bar on this question an examination of the bill discloses :

1. That there is no reference in it to the constitution of the United States.
2. That there is (transcript, p. 3) a claim set up that there was not sufficient notice to warrant a personal judgment. This, under the repeated decisions of this court, will be presumed to refer to the state constitution, as the federal constitution is not mentioned.
3. It was the duty of plaintiff in error in the state supreme court to assign error upon every question that

he wished to make there, and the failure so to do was a waiver of the right to present the question to that court (see our brief, p. 15 *et seq.*).

4. The only error assigned upon the constitutional questions was based upon this matter of notice (see transcript, p. 34).

The first question suggested in the fourth assignment of error as to personal liability is the question disposed of in the third subdivision of the opinion (transcript, p. 40), on the authority of *Farwell vs. Des Moines Brick Mfg. Co.*, 97 Ia., 286.

This question was whether Chapter 168 (brief, p. 56) repealed Section 479 (brief, p. 56), so as to relieve the plaintiff in error of personal liability under the statute.

The other question was as to the sufficiency of the notice (see 4th paragraph of the opinion; transcr., p. 40). The character of the cases cited there, the fact that there is no discussion of this question of benefits or power of the legislature to determine them, the conclusion of the court that "there is no force in *the claim that the plaintiff did not have notice*," and the admission in the brief of plaintiff in error (p. 19) that this was the single question presented to the supreme court of Iowa, demonstrate the correctness of our contention on this proposition. Certainly, it cannot be said that it clearly appears that this question was presented to that court. While the question here argued may be involved in the facts it was not involved in the case. It was not made in the *nisi prius* court; it was not made in the state supreme court; it has not been decided by that court, and no decision of that court on that question can be reviewed in this action.

Respectfully submitted,

N. T. GUERNSEY,
Attorney for Defendants in Error.

DEWEY *v.* DES MOINES.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 122. Argued January 11, 12, 1890.—Decided February 27, 1890.

A resident in and citizen of Chicago in Illinois, was the owner of certain lots in Des Moines in Iowa, which were assessed by the municipal authorities in that place to an amount beyond their value, for the purpose of paving the street upon which they abutted. The statutes of Iowa authorized a personal judgment against the owner in such cases.

VOL. CLXXIII—13

Statement of the Case.

He filed a petition to have the assessment set aside; to obtain an injunction against further proceedings for the sale of the property; and to obtain a judgment that there was no personal liability against him for the excess. This petition contained no allegation attacking the validity of the assessment by reason of any violation of the Federal Constitution, and there was nothing in the record to raise such Federal right or claim beyond the mere allegation in the petition that "the amount of said tax is greater than the reasonable market value of said lots, whether considered singly or together; the assessment against each particular lot being greater in amount than the value of such particular lot, and the aggregate assessment being greater in amount than the reasonable market value of all of said lots taken together; and that said defendants are seeking to enforce as against plaintiff not merely a sale of said lots but also to compel plaintiff to pay the full amount of said tax regardless of whatever sum said lots may be sold for, and regardless of the actual value of the same." The contractor for the pavement set up his right to a judgment on certificates given him for the work which had been done, which were made a lien upon the abutting lots. The trial court dismissed the petition, and gave judgment in favor of the contract. In the Supreme Court of the State it was assigned as error that "the court erred in holding and deciding that plaintiff was personally liable to said Des Moines Brick Manufacturing Company for so much of said special tax or assessment as could not or would not be realized by a sale of the sixty lots in question on special execution, and in ordering and adjudging that a general execution should issue against plaintiff and in favor of said Des Moines Brick Manufacturing Company for the balance of such tax or assessment; and further that, as plaintiff was at all times a non-resident of the State of Iowa and had no personal notice or knowledge of the assessment proceedings, that the imposition of a personal liability against him, in excess of the value of all the lots, was not due process of law and was in contravention of the provisions on that subject of the Fourteenth Amendment to the Constitution of the United States, as well as in contravention of the provisions of the constitution of the State of Iowa on the same subject." Held that this court was confined to the consideration of the question as to the validity of the personal judgment against the plaintiff in error, and that, without deciding what the effect of the proceedings would have been, if the plaintiff had been a resident in Iowa, the State had no power to enact a statute authorizing an assessment upon real estate for a local improvement, and imposing upon its owner, a non-resident of the State, a personal liability to pay such assessment.

THE petition in this case was filed by the plaintiff in error to set aside certain assessments upon his lots in Des Moines, in the State of Iowa, which had been imposed thereon for the purpose of paying for the paving of the street upon which the lots abutted, and to obtain a judgment enjoining pro-

Statement of the Case.

ceedings towards their sale, and adjudging that there was no personal liability to pay the excess of the assessment above the amount realized upon the sale of the lots.

The petition alleged that the petitioner was at all times during the proceedings mentioned a resident of Chicago, in the State of Illinois, and that he had no actual notice of any of the proceedings looking towards the paving of the street upon which his lots abutted; that the street was paved under the direction of the common council, which decided upon its necessity, and the expense was, by the provisions of the Iowa statute, assessed upon the abutting property, and the lot owner made personally liable for its payment; that the expense of the improvement was greater than the value of the lots assessed, and the common council knew it would be greater when the paving was ordered.

Various other facts were set up touching the invalidity of the assessment upon the lots, but no allegation was made attacking its validity by reason of any violation of the Federal Constitution. Under stipulation of the parties various allegations of fraud upon the part of the members of the common council, which had been included in the petition, were withdrawn, and the allegations of the petition as thus amended were not denied.

The contractor who did the work of paving the street was made a party to this proceeding, and he set up a counterclaim asking that the certificates given him by the city in payment for his services, and which by statute were made a lien upon the lots abutting upon the street, might be foreclosed and the lots sold, and a personal judgment pursuant to the same statute rendered against the plaintiff in error.

By stipulation certain motions, which were made to strike out allegations in the petition were treated as demurrers to the petition, and the case was thus placed at issue.

Upon the trial the district court of Polk County gave judgment dismissing the petition with costs, and in favor of the contractor on his counterclaim, foreclosing the lien of the latter and ordering the sale of the lots, and the judgment also provided for the issue of a personal or general execution.

Opinion of the Court.

against the plaintiff in error to collect any balance remaining unpaid after sale of the lots.

Plaintiff took the case to the state Supreme Court and there made an assignment of errors, one of which is as follows:

"The court erred in holding and deciding that plaintiff was personally liable to said Des Moines Brick Manufacturing Company for so much of said special tax or assessment as could not or would not be realized by a sale of the sixty lots in question on special execution, and in ordering and adjudging that a general execution should issue against plaintiff and in favor of said Des Moines Brick Manufacturing Company for the balance of such tax or assessment; and further that, as plaintiff was at all times a non-resident of the State of Iowa, and had no personal notice or knowledge of the assessment proceedings, that the imposition of a personal liability against him, in excess of the value of all the lots, was not due process of law, and was in contravention of the provisions on that subject of the Fourteenth Amendment to the Constitution of the United States, as well as in contravention of the provisions of the constitution of the State of Iowa on the same subject."

The Supreme Court affirmed the judgment of the district court, and plaintiff brought the case here by writ of error.

Mr. Andrew E. Harvey for plaintiff in error. *Mr. Amasa Cobb* was on his brief.

Mr. N. T. Guernsey for defendants in error.

MR. JUSTICE PECKHAM, after stating the facts, delivered the opinion of the court.

The only one of the assignments of error made in the state Supreme Court which has reference to any Federal question is the one set forth in the statement of facts, and it will be seen that such assignment relates solely to the validity of the provision for the personal liability imposed upon plaintiff in error by the judgment of the district court.

Opinion of the Court.

None of the other assignments of error involves any Federal question.

In the brief for plaintiff in error in this court it is said that the "counsel for plaintiff in error in the state court seem to have relied upon one single proposition only as involving a Federal question, to wit: As plaintiff was at all times a non-resident of the State of Iowa and had no personal notice or knowledge of the assessment proceedings, the imposition of the personal liability against him in excess of the value of all the lots was not due process of law, and was in contravention of the provisions upon that subject of the Fourteenth Amendment of the Constitution of the United States."

The counsel, however, does not confine himself in this court solely to a discussion of the Federal question which was contained in the assignment of error above set forth, and which was argued in the court below, regarding the validity of a personal judgment; but counsel claims the further right to attack the validity of the assessment upon the lots themselves, because as he asserts it was laid without regard to any question of benefits, and that it exceeds the actual value of the property assessed, and that even if permitted by the statute of Iowa, such an assessment constitutes a taking, under the guise of taxation, of private property for public use without just compensation, and is therefore void under the Federal Constitution as amounting to a taking of property without due process of law.

This is a very different question from that embraced in the assignment of errors and argued in the Supreme Court of the State.

It is objected on the part of the defendant in error that as this is a review of a judgment of a state court, this second question cannot be raised here, because it was not raised in the courts below and was not decided by either of them.

Reference to the opinion of the Supreme Court of the State shows that it was not therein discussed or decided. If the question were only an enlargement of the one mentioned in the assignment of errors, or if it were so connected with

Opinion of the Court.

it in substance as to form but another ground or reason for alleging the invalidity of the personal judgment, we should have no hesitation in holding the assignment sufficient to permit the question to be now raised and argued.

Parties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed. Having, however, raised only one Federal question in the court below, can a party come into this court from a state court and argue the question thus raised, and also another not connected with it and which was not raised in any of the courts below and does not necessarily arise on the record, although an inspection of the record shows the existence of facts upon which the question might have been raised?

The two questions, the one as to the invalidity of the personal judgment and the other as to the invalidity of the assessment upon the lots, are not in anywise necessarily connected any more than that they both arise out of the proceedings in paving the street and in levying the assessment. The assessment upon the lots might be valid, while the provision for a personal judgment might be void, each depending upon different principles, and the question as to the invalidity of the personal judgment might, as in this case, be raised and argued without in any manner touching the question as to the invalidity of the assessment upon the lots.

In *Oxley Stave Company v. Butler County*, 166 U. S. 648, it was held that the Federal question must be specially taken or claimed in the state court; that the party must have the intent to invoke, for the protection of his rights, the Constitution or some statute or treaty of the United States, and that such intention must be declared in some unmistakable manner, and unless he do so this court is without jurisdiction to reëxamine the final judgment of the state court upon that matter. See also *Levy v. Superior Court of San Francisco*, 167 U. S. 175; *Kipley v. Illinois*, 170 U. S. 182. In other words, the court must be able to see clearly from the whole record that a provision of the Constitution or act of Congress is relied upon by the party who brings the writ of error, and that the right thus claimed by him was denied. *Bridge Pro-*

Opinion of the Court.

prietors v. Hoboken Company, 1 Wall. 116, 143. In the case at bar no claim was made in the state court that the assessment upon the lots was invalid as in violation of any provision of the Federal Constitution.

Nor does the record herein show by clear and necessary intendment that the Federal question must have been directly involved so that the state court could not have given judgment without deciding it. In such case it has been held that the Federal question sufficiently appears. *Green Bay &c. Company v. Patten Paper Company*, 172 U. S. 58, 68, and cases cited. In substance, the validity of the statute or the right under the Constitution must have been drawn in question. *Powell v. Brunswick County*, 150 U. S. 433; *Sayward v. Denny*, 158 U. S. 180. The latest decision to this effect is *Capital National Bank of Lincoln v. First National Bank of Cadiz*, 172 U. S. 425.

Although no particular form of words is necessary to be used in order that the Federal question may be said to be involved, within the meaning of the cases on this subject, there yet must be something in the case before the state court which at least would call its attention to the Federal question as one that was relied on by the party, and then, if the decision of the court, while not noticing the question, was such that the judgment was by its necessary effect a denial of the right claimed or referred to, it would be sufficient. It must appear from the record that the right set up or claimed was denied by the judgment or that such was its necessary effect in law. *Roby v. Colehour*, 146 U. S. 153, 159; *Chicago, Burlington &c. Railroad v. Chicago*, 166 U. S. 226, 231; *Green Bay &c. Company v. Patten Paper Company*; and *Bank of Lincoln v. Bank of Cadiz, supra*.

In all these cases it did appear from the record that the rights were set up or claimed in such a way as to bring the subject to the attention of the state court. It is not enough that there may be somewhere hidden in the record a question which, if raised, would be of a Federal nature. *Hamilton Company v. Massachusetts*, 6 Wall. 632. In order to be available in this court some claim or right must have been asserted

Opinion of the Court.

in the court below by which it would appear that the party asserting the right founded it in some degree upon the Constitution or laws or treaties of the United States. In such case, if the court below denied the right claimed, it would be enough; or if it did not in terms deny such right, if the necessary effect of its judgment was to deny it, then it would be enough. But the denial, whether expressed or implied, must be of some right or claim founded upon the Constitution or the laws or treaties of the United States which had in some manner been brought to the attention of the court below. The record shows nothing of the kind in this case.

A claim or right which has never been made or asserted cannot be said to have been denied by a judgment which does not refer to it. *Hamilton Company v. Massachusetts*, *supra*. A point that was never raised cannot be said to have been decided adversely to a party, who never set it up or in any way alluded to it. Nor can it be said that the necessary effect in law of a judgment, which is silent upon the question, is the denial of a claim or right which might have been involved therein, but which in fact was never in any way set up or spoken of.

No question of a Federal nature claimed under the Constitution of the United States can be said to have been made by the mere allegation "that the amount of said tax is greater than the reasonable market value of said lots, whether considered singly or together; the assessment against each particular lot being greater in amount than the value of such particular lot, and the aggregate assessment being greater in amount than the reasonable market value of all of said lots taken together; and that said defendants are seeking to enforce as against plaintiff not merely a sale of said lots, but also to compel plaintiff to pay the full amount of said tax regardless of whatever sum said lots may be sold for and regardless of the actual value of the same." There is nothing else in the record which can be said to raise this Federal right or claim.

Upon these facts we are compelled to hold that we are confined to a discussion of the only Federal question which this

Opinion of the Court.

record presents, viz.: The validity of the personal judgment against the plaintiff in error. The assignment of error above set out is broad enough to raise the question not only as to the sufficiency of notice, but as to the validity of such a judgment against a non-resident.

It is asserted in the petition that the defendant Dillworth, the treasurer of Holt County, is attempting to enforce the assessment levied by the common council, and that he claims plaintiff in error is personally liable for the taxes and interest, and will enforce payment thereof unless restrained, and that plaintiff's personal property is liable to be illegally seized for the payment of the tax. These allegations are substantially admitted by the answers of the defendants, except as to the illegality of the possible seizure of plaintiff's personal property. By filing the counterclaim the contractor makes a direct attempt to enforce, not only the lien upon the lots, but the personal liability of the lot owner. Thus a non-resident, simply because he was the owner of property on a street in a city in the State of Iowa, finds himself by the provisions of the state statute, and without the service of any process upon him, laid under a personal obligation to pay a tax assessed by the common council, or by the board of public works and city engineer under the statute, upon his property abutting upon the street, for the purpose of paying the expenses incurred in paving the street, which expenses are greater than the benefit the lots have received by virtue of the improvement. The plaintiff, prior to the imposition of that assessment, had never submitted himself to the jurisdiction of the State of Iowa, and the only jurisdiction that State had in the assessment proceedings was over the real property belonging to him and abutting on the street to be improved. An assessment upon lots, for a local improvement, is in the nature of a judgment.

It is said that the statute (Code of Iowa, sec. 478) provides for the personal liability of the owner of lots in a city in the State of Iowa, to pay the whole tax or assessment levied to pay the cost of a local improvement, and that the same statute provides that the assessment shall also be a lien upon the respective lots from the time of the assessment. It is also said

Opinion of the Court.

that the statute has been held to be valid by the Iowa Supreme Court. This seems to be true. *Burlington v. Quick*, 47 Iowa, 222, 226; *Farwell v. Des Moines Brick Manufacturing Co.*, 97 Iowa, 286. The same thing is also held in the opinion of the state court delivered in the case now before us.

In this case no question arises with regard to the validity of a personal judgment like the one herein against a resident of the State of Iowa, and we therefore express no opinion upon that subject. This plaintiff was at all times a non-resident of that State, and we think that a statute authorizing an assessment to be levied upon property for a local improvement, and imposing upon the lot owner, who is a non-resident of the State, a personal liability to pay such assessment, is a statute which the State has no power to enact, and which cannot therefore furnish any foundation for a personal claim against such non-resident. There is no course of reasoning as to the character of an assessment upon lots for a local improvement by which it can be shown that any jurisdiction to collect the assessment personally from a non-resident can exist. The State may provide for the sale of the property upon which the assessment is laid, but it cannot under any guise or pretence proceed farther and impose a personal liability upon a non-resident to pay the assessment or any part of it. To enforce an assessment of such a nature against a non-resident, so far as his personal liability is concerned, would amount to the taking of property without due process of law, and would be a violation of the Federal Constitution.

In this proceeding of the lot owner to have the assessment set aside and the statutory liability of plaintiff adjudged invalid the court was not justified in dismissing the petition and giving the contractor, not only judgment on his counterclaim foreclosing his lien, but also inserting in that judgment a provision for a personal liability against the plaintiff and for a general execution against him. Such a provision against a non-resident, although a litigant in the courts of the State, was not only erroneous but it was so far erroneous as to constitute, if enforced, a violation of the Federal Constitution for the reason already mentioned. By resorting to the state court

Opinion of the Court.

to obtain relief from the assessment and from any personal liability provided for by the statute, the plaintiff did not thereby in any manner consent, or render himself liable, to a judgment against him providing for any personal liability. Nor did the counterclaim made by the defendant contractor give any such authority.

The principle which renders void a statute providing for the personal liability of a non-resident to pay a tax of this nature is the same which prevents a State from taking jurisdiction through its courts, by virtue of any statute, over a non-resident not served with process within the State, to enforce a mere personal liability, and where no property of the non-resident has been seized or brought under the control of the court. This principle has been frequently decided in this court. One of the leading cases is *Pennoyer v. Neff*, 95 U. S. 714, and many other cases therein cited. *Mexican Central Railway v. Pinkney*, 149 U. S. 194, 209.

The lot owner never voluntarily or otherwise appeared in any of the proceedings leading up to the levying of the assessment. He gave no consent which amounted to an acknowledgment of the jurisdiction of the city or common council over his person.

A judgment without personal service against a non-resident is only good so far as it affects the property which is taken or brought under the control of the court or other tribunal in an ordinary action to enforce a personal liability, and no jurisdiction is thereby acquired over the person of a non-resident further than respects the property so taken. This is as true in the case of an assessment against a non-resident of such a nature as this one as in the case of a more formal judgment.

The jurisdiction to tax exists only in regard to persons and property or upon the business done within the State, and such jurisdiction cannot be enlarged by reason of a statute which assumes to make a non-resident personally liable to pay a tax of the nature of the one in question. All subjects over which the sovereign power of the State extends are objects of taxation. Cooley on Taxation, 1st ed. pp. 3, 4; Burroughs on

Opinion of the Court.

Taxation, sec. 6. The power of the State to tax extends to all objects within the sovereignty of the State. (Per Mr. Justice Clifford, in *Hamilton Company v. Massachusetts*, 6 Wall. 632, at 638.) The power to tax is however limited to persons, property and business within the State, and it cannot reach the person of a non-resident. *State Tax on Foreign-held Bonds*, 15 Wall. 300, 319. In Cooley on Taxation, 1st ed. p. 121, it is said that "a State can no more subject to its power a single person or a single article of property whose residence or legal situs is in another State, than it can subject all the citizens or all the property of such other State to its power." These are elementary propositions, but they are referred to only for the purpose of pointing out that a statute imposing a personal liability upon a non-resident to pay such an assessment as this oversteps the sovereign power of a State.

In this case the contractor, by filing his counterclaim herein, has commenced the enforcement of an assessment and a personal liability imposed by virtue of just such a statute, and the judgment under review gives him the right to do so. The lot owner is called upon to make such defence as he can to the claim of personal liability or else be forever barred from setting it up. He does claim that as a non-resident he did not have such notice, and the State or city did not obtain such jurisdiction over him, with regard to the original assessment as would authorize the establishment of any personal liability on his part to pay such assessment.

The contractor nevertheless has obtained a judgment, not alone for a foreclosure of his lien, but also for the personal liability of the lot owner, and unless he can in this proceeding have the provision in the judgment, for a personal liability, stricken out, the lot owner cannot thereafter resist it, even when the lots fail (if they should fail) to bring enough on their sale to satisfy the judgment.

The case of *Davidson v. New Orleans*, 96 U. S. 97, has been cited as authority for the proposition that the rendering of a personal judgment for the amount of an assessment for a local improvement is a matter in which the state authorities cannot be controlled by the Federal Constitution. It does not

Statement of the Case.

appear in that case that the complaining party, in regard to the state statute, was a non-resident of the State, but on the contrary it would seem that she was a resident thereof. That fact is a most material one, and renders the case so unlike the one at bar as to make it unnecessary to further refer to it.

The statute, upon which the right to enter this personal judgment depends, being as to the non-resident lot owner an illegal enactment, it follows that the judgment should and must be amended by striking out the provision for such personal liability. For that purpose the judgment is

Reversed and the cause remanded to the Supreme Court of Iowa, for further proceedings therein not inconsistent with this opinion.
